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OCT 19 1929
CHARLES ELMORE CROPLEY

In the Supreme Court
OF THE
United States

October Term, 1929

No. 29

ALICE BARBEE WICK,
Appellant,

vs.

CHELAN ELECTRIC COMPANY,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Respondent

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In the Supreme Court
OF THE
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October Term, 1929

No. 29

ALICE BARBEE WICK,
Appellant,

vs.

CHELAN ELECTRIC COMPANY,
Respondent.

Brief of Respondent

STATEMENT OF THE CASE

Alice Barbee Wick has appealed to this court from a judgment of the Supreme Court of the State of Washington, in an eminent domain proceeding affirming an order of public use and necessity and a judgment on a verdict of a jury awarding $13,500 damages, entered in the Superior Court of Chelan County. The action was brought by respondent Chelan Electric Company against appellant, a citizen of the State of Pennsylvania, and Chelan County,

Washington, a municipal corporation, a citizen of the State of Washington, to acquire the right to overflow and damage lands and property bordering on Lake Chelan in the State of Washington (T. 1-9, 20-23).

Schuyler J. Gray and wife, upon notice from the appellant, joined in a writ of error to review the judgment of the State Supreme Court affirming the order of public use and necessity entered by the Superior Court of Chelan County (Original Record, p. 371). A motion to pass consideration of the writ of error and to consolidate it with this appeal was denied October 29, 1928. *Wick, et al. vs. Superior Court,* 49 Sup. Ct. R. 94, 73 L. Ed. 87. The writ of error was dismissed by this court December 10, 1928, for the reason that the order sought to be reviewed was not a final judgment. *Wick, et al. vs. Superior Court,* 49 Sup. Ct. R. 94, 73 L. Ed. 190. Gray and wife have not joined in this appeal.

None of the other respondents in the sixteen condemnation cases which were consolidated by the trial court with this case has appealed to this court (T. 45, 143).

The decision of the Supreme Court of Washington affirming the order of public use and necessity

in the consolidated case is reported in *State ex rel. Woodruff vs. Superior Court,* 145 Wash. 129, 259 Pac. 379 (T. 142).

The opinion affirming the judgment on the verdict is reported in *Chelan Electric Co. vs. Wick,* 148 Wash. 479, 269 Pac. 827 (T. 202).

The appellant seeks to have the decisions of the Supreme Court of the State of Washington on both branches of the case reviewed by this court, but has not brought up the evidence in either proceeding. The statement of facts in *Chelan Electric Co. vs. Wick* was stricken from the record by the State Supreme Court (T. 203), and the evidence upon which the order of public use and necessity was made in *State ex rel. Woodruff vs. Superior Court* has not been certified.

The Supreme Court of Washington has determined adversely contentions made by the appellant and others in a series of cases involving the Lake Chelan project. *State ex rel. Chelan Electric Co. vs. Superior Court,* 142 Wash. 270, 253 Pac. 115; *State ex rel. Flick vs. Superior Court,* 144 Wash. 124, 257 Pac. 231; *State ex rel. Perry vs. Superior Court,* 145 Wash. 178, 259 Pac. 382; *Chelan Electric Co. vs. Perry,* 148 Wash. 353, 268 Pac. 1040.

In none of these cases has any attempt been made to invoke the jurisdiction of this court, except in the Crooker Perry case. A petition in that case for writ of certiorari was denied. *State of Washington ex rel. Crooker Perry, et al. vs. Superior Court,* 276 U. S. 626, 72 L. Ed. 738. An appeal in the same case was dismissed for want of a substantial Federal question. *Crooker Perry, et al. vs. Chelan Electric Co.,* 49 Sup. Ct. R. 478, 73 L. Ed. 545.

The Chelan Electric Company, pursuant to the state constitution and statutes (Appendix, p. 97), on September 17th, 1926, filed in the office of the Clerk of Chelan County a condemnation petition, which, having alleged jurisdictional facts, prayed that, after notice of hearing, the contemplated use be adjudged a public object and use, that the public interest requires the prosecution of the enterprise, that the property is required and necessary for the purposes of the project and that compensation be awarded therefor to the defendants entitled thereto. It is alleged that the names of each and every owner, encumbrancer and person or party interested in the property, so far as can be ascertained from the public records or otherwise, are Alice Barbee Wick (a citizen and resident of the State of Pennsylvania) and Chelan County, Washington, a municipal corpora-

tion (a citizen and resident of the State of Washington), and that the Chelan Electric Company, the petitioner, is a corporation organized and existing under the laws of the State of Washington (T. 3-9). At the same time a notice of hearing of the petition, returnable October 11th, was filed (T. 1-3). An affidavit of non-residence of appellant Wick having been filed September 22nd (T. 11), publication of the notice was made in a daily newspaper in the county seat of Chelan County once each week for three consecutive weeks, beginning September 23rd and ending October 7th, 1926 (T. 15). On the next day, October 8th, three days before the return day, which was October 11th, appellant Wick filed a special appearance in the case (T. 12, 195). On October 4th the appellant Chelan County filed a general appearance (T. 195). On October 11th all parties being then in court hearing on the petition was continued to November 4th, 1926, and was thereafter continued from time to time to February 28th, 1927 (T. 15, 35-45).

The hearing on the question of public use and necessity in the Wick (and in the sixteen other cases with which it was consolidated) began February 28th, 1927, and findings of fact, conclusions of law and an order of public use and necessity were entered by the trial court, after a hearing, on March 23rd, 1927 (T. 45-64).

On April 27th, 1927 (two months before the trial in the Superior Court on the question of damages) the petitioner filed a bill of particulars, giving a detailed metes and bounds description of the property sought to be condemned. This description covers over six pages of the printed transcript (T. 75-81). The order of public use and necessity was reviewed by the Supreme Court of the State of Washington upon a writ of certiorari (T. 142, 194).

The Supreme Court remitted the case to the Superior Court for trial on the question of damages (T. 142-149). In the meantime, and on June 23rd, 1927, the case proceeded to trial before a jury in the Superior Court on the question of the amount of compensation to be paid to the owners, encumbrancers and persons or parties interested in the property sought to be condemned. A verdict was returned awarding $13,500 as full compensation to be paid to the "owners and all tenants, encumbrancers and others interested for the taking or injuriously affecting the land, real estate, premises and property described in the petition and bill of particulars in this action" (T. 114). Judgment on the verdict was entered on July 9th, 1927, and the respondent having deposited the amount of the verdict, costs and interest in court, a decree of appropriation was entered on the same day (T. 125-141).

Upon appeal from the judgment on the verdict the State Supreme Court affirmed the judgment of the lower court, after striking the statement of facts, which had not been filed in accordance with the state statutes (T. 202). The appeal is from this judgment (T. 155).

No reference has been made to the removal proceedings, which are referred to in detail in that part of the brief in which this question is discussed.

STATEMENT OF FACTS

The only facts before the court are those disclosed by the findings (T. 45), the order denying the second petition for removal (T. 92), the opinions of the State Supreme Court (T. 142, 202), and the Federal Power License (T. 159). The order denying the second petition for removal recites some of the facts which appeared of record at the trial on the question of damages. Otherwise the evidence introduced at this trial is not before the court (T. 203). No attempt has been made to take up the evidence introduced at the hearing on the question of public use and necessity.

The Chelan Electric Company is incorporated, authorized and licensed to do business in the State of Washington as a public service corporation, and its

corporate powers include the right to develop the water power of Lake Chelan and the Chelan River. Requisite permits from the State to appropriate the necessary waters, to construct the reservoir and store such waters were issued. These permits entitle the Electric Company to the use of the waters in the development of electric power and energy for municipal lighting, railway operation, irrigation pumping and other uses permitted by law. Lake Chelan is one of the navigable waters of the United States. The Federal Power Commission has issued to the Chelan Electric Company a license for the construction, operation and maintenance of dams and other project works necessary for the water power development, subject to terms which were accepted by the Electric Company. The stock of the Chelan Electric Company is owned by The Washington Water Power Company, a duly authorized public service corporation of the State of Washington, which is under contract to furnish other public service corporations in Washington electrical energy for the operation of railways and also to furnish municipal corporations and their inhabitants electrical energy for lighting streets and homes and other public uses.

The power generated at Lake Chelan is to be distributed by The Washington Water Power Company.

which owns seven hydro-electric plants, and in the years 1925 and 1926 these seven plants were insufficient to supply the needs of its customers and it was necessary for it to purchase power from other companies to avoid a shortage. For this reason and the increasing demands for power, and in order to accommodate the public, it became necessary to develop another power plant, which it planned to do by the development of the Lake Chelan enterprise through the acquisition of the stock of the Chelan Electric Company.

To develop power at Lake Chelan it is necessary to construct a dam in the Chelan River for the storage of water in Lake Chelan to the maximum elevation of 1100 feet, still water measurement, above mean sea level, and to overflow the land of appellant lying below said elevation. The electric energy so produced, the trial court found, "is and will be devoted to public use, and the object for which the lands, real estate, premises and property of the respondents are sought to be appropriated is and will be a public object and use and the public interest requires and will require the prosecution of the enterprise of the petitioner." (T. 2-9, 45-64.) This was also found as a fact by the State Supreme Court (T. 143).

The appellant owns lands bordering upon Lake Chelan and this action was instituted "to acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River and to raise the same to the maximum elevation of 1100 feet above mean sea level and to inundate and overflow to the maximum elevation of 1100 feet above mean sea level" the lands of appellant, and to have a jury determine the amount of damages to be awarded for the taking and injuriously affecting the said lands (T. 3-9).

Chelan County, Washington, a municipal corporation, was joined as a party defendant, it being alleged in the petition to be one of the owners, encumbrancers and persons or parties interested in the property described in the petition.

The facts will be referred to more in detail in the body of the brief.

APPELLANT'S CONTENTIONS

A fair statement of the points raised by appellant is as follows:

(1) The state statute providing for notice to nonresidents in eminent domain proceedings by newspaper publication once a week for two consecutive weeks, and the notice actually given, do not constitute

due process of law under the Fourteenth Amendment to the Constitution of the United States;

(2) The condemnation of appellant's property in the State of Washington for the purpose of developing electric energy to be distributed by another public service corporation, or to be used in the State of Idaho, constitutes the taking of private property for private use, which amounts to the taking of appellant's property without due process of law;

(3) The description of appellant's property sought to be condemned was so inadequate as to constitute depriving appellant of her property without due process of law;

(4) By measuring the elevation of the lake at still water the land appropriated was in excess of that sought to be condemned in the notice and petition and authorized by the Federal Power license, and therefore amounted to depriving appellant of her property without due process of law;

(5) The instructions given to the jury were erroneous and those refused correctly stated the law;

(6) Appellant was denied the right of removal to the Federal Court on the ground of diversity of citizenship, by reason of an alleged improper joinder of Chelan County as a party defendant, it being con-

tended that the state tax statute and its construction by the Supreme Court of the State of Washington to the effect that taxes are a lien upon land before they are permitted to be paid, is in conflict with Article III, Section 2, paragraph 1, of the Constitution of the United States.

SUMMARY OF RESPONDENT'S ARGUMENT

(1) The notice to non-residents of the hearing of the condemnation petition by publication once a week for two consecutive weeks provided by the state statute, and the notice actually given by publication for three consecutive weeks, the first publication being eighteen days before the return day, was reasonable and adequate, constituted due process of law, and resulted in the appearance of the appellant in the proceeding three days before the return day;

(2) The power of the Chelan Electric Company to condemn appellant's property for public use is not affected by the fact that another public service corporation will distribute the power to the consumers;

(3) The transmission of power generated at Lake Chelan in the State of Washington into the State of Idaho is not an issue in this case, both the trial and the State Supreme Court having found as a fact that none of the Chelan power would be used in Idaho;

(4) All of the Chelan power will be devoted to public uses;

(5) A full, adequate and sufficient metes and bounds description of the property sought to be condemned was furnished appellant two months prior to the trial on the question of damages, and the description contained in the notice and petition was sufficiently definite whether service was made personally or by publication;

(6) There is no substantial difference between the order of public use and necessity and the final judgment giving respondent the right to store the water in Lake Chelan to the maximum elevation of 1100 feet, still water measurement, above mean sea level, and the prayer of the original petition for the right to impound and store the water of the lake to the maximum elevation of 1100 feet above mean sea level, and the right granted to respondent by the order of public use and necessity and the final judgment is within those sought in the original petition and authorized by the Federal power license;

(7) The contentions relative to the giving and refusal of instructions do not raise any Federal questions and are not before this court for review;

(8) The case was not removable to the Federal Court, and, having been once removed and remanded, there was no denial of the right of removal. The constitutionality of the tax statutes of Washington is not an issue;

(9) The assignment of errors from the trial court to the State Supreme Court has not been incorporated in the record, nor has the testimony in either proceeding been certified to this court. The only Federal questions that can be considered are those passed upon by the Supreme Court of the State of Washington, and since no substantial Federal questions were decided by that court there is no Federal question raised by this appeal.

ARGUMENT

I. The notice to non-residents of the hearing of the condemnation petition by publication once a week for two consecutive weeks provided by the state statute, and the notice actually given by publication for three consecutive weeks, the first publication being eighteen days before the return day, was reasonable and adequate, constituted due process of law, and resulted in the appearance of the appellant in the proceeding three days before the return day.

The Washington condemnation statute relating to notice provides that in cases of non-residents "service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks . . . And

such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown." Remington's Compiled Statutes of Washington, Sec. 922 (Appendix, p. 99).

The notice of hearing filed in the cause on September 17, 1926, fixed the return day October 11th, 1926 (T. 1). The notice was published September 23, September 30 and October 7, 1926 (T. 146, 16). Fourteen days intervened between the first and the last publications and eighteen days between the first publication and the return day (T. 3). The appellant appeared in the cause three days before the return day, or on October 8, fifteen days after the first publication of the notice (T. 12). The hearing was actually held February 28, 1927, over four and one-half months later. The appellant, through her counsel, was present at the hearing and contested the granting of the order of public use and necessity (T. 45). At the time appellant filed her appearance on October 8, three days prior to the time she was required by law to appear, she objected to being required to appear on the ground that she had not had sufficient notice to enable her to do the thing that she was doing (T. 12-14).

Appellant contends that the Washington statute requires that the notice must be published once a

week for two successive weeks and that ten days must elapse after the expiration of this two weeks' period before the hearing can be held, so that the hearing in this case could not be prior to October 17, whereas the return day fixed in the notice was October 11th. It is then argued that the publication was not complete until October 7 and therefore appellant had only four days' notice prior to the return day.

But the Supreme Court of Washington rejected this interpretation of the statute proposed by appellant, saying:

> "Our statute says nothing whatever about a return day, but only the number of publications of the notice where publication must be had. The return day not being regulated by statute, as was the case in *Roller vs. Holly, supra* (176 U. S. 398; 44 L. Ed. 520), it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the Constitution." (T. 147.)

The statute of the State of Washington having been thus interpreted by the highest court of that state, appellant is not entitled to have this court reinvestigate that question for the purpose of determining whether it will make a different interpretation of the Washington statute.

The construction of a statute by the state court is regarded as a part of the statute and it is as binding upon the courts of the United States as the text. *C. M. & S. P. Ry. Co. vs. Risty,* 276 U. S. 567; 72 L. Ed. 703; *Knights of Pythis vs. Meyer,* 265 U. S. 30, 33; 68 L. Ed. 885, 888; *Saltonstall vs. Saltonstall,* 276 U. S. 260, 270; 72 L. Ed. 565, 568; *Carroll County vs. U. S.,* 18 Wall. 71, 82; 21 L. Ed. 771, 775; *N. P. Ry. Co. vs. Meese,* 239 U. S. 614; 60 L. Ed. 467; *C. & N. W. R. Co. vs. Nye-Schneider-Fowler Co.,* 260 U. S. 35; 67 L. Ed. 115; *Tullis vs. S. E. & W. R. R. Co.,* 175 U. S. 348; 44 L. Ed. 192; *Bucher vs. Cheshire Ry. Co.,* 125 U. S. 555; 31 L. Ed. 795; *Leffingwell vs. Warren,* 2 Black 599; 17 L. Ed. 261.

> "Mixed with the contention is a charge that the notice to non-residents did not comply with the Act of 1893 or the general law of the state, but this is decided against plaintiffs in error by the Supreme Court of the state and we accept its ruling . . . What the statute required was for the Supreme Court to determine; whether as determined, it constituted due process, is for us to decide."
>
> *Ballard vs. Hunter,* 204 U. S. 241, 255; 51 L. Ed. 461, 471, 474.

In the case of *House vs. Road Improvement Dist. No. 5,* 266 U. S. 175, 177; 69 L. Ed. 229, 230, the appellant alleged that the state statute authorized and the commissioners gave only 17 days' notice by pub-

lication of an assessment for benefits in the establishment of a road district and that such publication did not afford due process of law. The state court held the statute allowed, and appellant had, twenty-eight days after the first publication. This court accepted the interpretation of the state statute by the state court, saying:

> "Accepting the statute as construed by the state court, the suggested objections to its validity appear wholly wanting in merit."

In the case at bar the Supreme Court of Washington held that the statute requires publication once each week for two successive weeks, that it does not regulate the return day but leaves that to be fixed by the petitioner, that in this case the return day was 18 days after the first publication and that the 18 days which elapsed between the date of the first publication and the return day gave appellant a reasonable time within which to appear in the action and an opportunity to be heard.

Therefore the question before this court is whether a statute providing for publication of notice once a week for two successive weeks and a notice published pursuant to that statute giving 18 days' time between the first publication and the return day constitute due process of law under the Constitution of the United States.

With reference to indirect notice in actions *in rem,* as applied to lands in proceedings seeking to subject them to public necessity, there is a sensible and practical theory supported by authority that the test is whether the publication of notice was such as to create a reasonable presumption that, if the owner is present and taking care of his property, he would receive notice of what is going on and have an opportunity to defend. *Ballard vs. Hunter,* 204 U. S. 241; 51 L. Ed. 461; *Bellingham Bay I. & B. C. R. R. Co. vs. City of New Whatcom,* 172 U. S. 314; 43 L. Ed. 460; *Huling vs. Kaw Valley R. & Imp. Co.,* 130 U. S. 559; 32 L. Ed. 1045; *Windsor vs. McVeigh,* 93 U. S. 274; 23 L. Ed. 914; *G. N. Ry. Co. vs. City of Minneapolis,* 136 Minn. 1; 161 N. W. 231; *State ex rel. Woodruff vs. Superior Court of Chelan County,* 145 Wash. 129; 259 Pac. 379; *Goodrich vs. Ferris,* 214 U. S. 71; 53 L. Ed. 914; 145 Fed. 844, 859.

The law presumes that an owner of real property is paying some attention to what is going on in the locality where his property is situated. With respect to this presumption, the court says in *Ballard vs. Hunter,* 204 U. S. 241 at page 262, 51 L. Ed. 461, at page 474:

> "The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its

proceedings it must, at times, adopt some form of indirect notice; and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns, or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises."

In *Huling vs. Kaw Valley R. & I. Co.*, 130 U. S. 559; 32 L. Ed. 1045, it is declared to be "the duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences." See *Windsor vs. McVeigh*, 93 U. S. 274; 23 L. Ed. 914.

It was held by Judge Morrow in *Goodrich vs. Ferris*, 145 Fed. 844, 859, that a proceeding to secure distribution of the estate of a decedent, is essentially one *in rem*, in which the parties interested may be bound by constructive notice, the reasonableness of which must be determined with reference to the requirements of ordinary cases; and that notice given by posting ten days before the hearing was not unreasonably short, and constituted due process of law as

against all parties, without regard to their place of residence. Quoting from that decision:

> "If in such proceeding the entire world is called before the court, and to enable the court to enter a valid decree the entire world must have reasonable notice, it will necessarily follow that the notice that will bind all parties must be of such nature as could reach the most distant possible party interested in the estate. To state the proposition is to show its absurdity. It would be impracticable, and, moreover, under such a rule no decree would carry with it any presumption of validity, but rather, on the contrary, invite the presumption that it was invalid. 'Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitude to which they are subject. This is the foundation of all judicial proceedings in rem.'"

We are not here concerned with the question whether appellant, a resident of Pennsylvania, had sufficient time to receive word of this eminent domain proceeding through the mails and to travel to the state of Washington to prepare a defense to the action. The law presumes that every owner is in possession of his property either personally or by agent and that either he or his agent will read and heed any notices published concerning his property. In the exercise of the power of eminent domain the state of

Washington could have directed that private property within its borders could be taken for public use without any specific reference in the notice to the name of the owner so long as it provide for a notice to be published containing a description of the property adequate to convey either actual or constructive notice to the owner, or to an agent in possession or managing the property for the owner, of the intention to appropriate.

> *Ballard* vs. *Hunter*, 204 U. S. 241, 256, 257; 51 L. Ed. 463, 472; *Castillo* vs. *McConnico*, 168 U. S. 674; 42 L. Ed. 622; *Pennoyer* vs. *Neff*, 95 U. S. 714; 24 L. Ed. 565, 570.

The principles determining the validity of statutes regulating notice by publication in condemnation proceedings are well stated in a decision of the Supreme Court of Iowa:

> "The legislature having been given the power by the Constitution to appropriate property for the public use upon the payment of adequate compensation, the authority to authorize the proceedings by which such appropriation shall be made necessarily is implied. Whatever these may be, the owners from whom the appropriation is to be made must have notice sufficient to apprise them what is to be done, and for sufficient time to afford them the opportunity to have a hearing before a competent tribunal. Such notice may be by publication, but for how long a time before the hearing? This is largely a matter of legislative discretion. The time may not be so

brief that *if the owner were to read the notice when first published* he could not, with reasonable diligence, prepare for and reach the place of hearing so as to present his claim; that is, it may not be arbitrarily so limited as that, were the published notice to reach him, he would not have the chance to present his claim. On the other hand, it need not be for so long a time as to insure knowledge to everyone. All necessary is that the publication of notice be made under such circumstances that persons of ordinary intelligence having an interest in the subject-matter living in the community, will be reasonably likely either to read the notice as published, or learn thereof from or through other sources. This is the theory on which service of notice by publication generally is sustained. Reaching those residing in the immediate community, it is assumed to have come to the knowledge of the non-resident through those to whom he has intrusted his property, or who are representing him, and if he has not taken these measures of protection and fails to get the notice as published, it is his misfortune, and he must bide the consequences. *Hulbert* vs. *New Valley R. & Improv. Co.*, 130 U. S. 510, 32 L. Ed. 1045; 9 Sup. Ct. Rep. 603. The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right before it is finally barred." *Taylor* vs. *Drainage District No. 56*, 167 Ia. 42; 148 N. W. 1040.

The due process clause of the Constitution of the United States does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has rea-

sonable notice, and reasonable opportunity to be heard and to present his claim or defense. Twenty days' written notice of a proceeding to revoke the license of a physician has been held reasonable. *State of Missouri ex rel. Hurwitz vs. North,* 271 U. S. 40, 42; 70 L. Ed. 818, 821; 12 Corpus Juris, page 1232.

In the case of *Roller vs. Holly,* 176 U. S. 398, 44 L. Ed. 520, relied on by appellant, it was practically impossible for the defendant who was in Virginia, to appear in Texas within the five days prescribed by the notice, and judgment against him was taken by default. There was no default here. The Washington court in distinguishing this case said:

> "Counsel argues, as we understand, that, because our statute speaks of two weekly publications, it means eight days' notice and that that length of time, under the circumstances in this case, does not furnish due process of law under the doctrine of the *Roller* case. That case speaks of the date of *service* with relation to the *return* day. Our statute says nothing whatever about a *return* day, but only the number of publications of the notice, where publication must be had. The return day not being regulated by statute, as was the case in *Roller vs. Holly, supra,* it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the constitution?"

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129; 259 Pac. 379 (T. 147).

While five days' notice was held not to constitute due process of law in *Roller vs. Holly,* a suit between private parties, it does not necessarily follow it would not be due process in an eminent domain proceeding. In that case the court says, "An ordinary summons to answer the suit of a private individual contemplates that the party served may have other business of equal or greater importance engaging his attention."

In *Davidson vs. New Orleans,* 96 U. S. 97, 108; 24 L. Ed. 616, 620; *Hagar vs. Reclamation District,* 111 U. S. 701, 715; 28 L. Ed. 569, 572, it is said:

> "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.'"

What the law is concerned with is that there be a publication for a sufficient length of time that will enable the owner, if he is watching his property in the manner that the law presumes he will watch it, to appear in court and protect his interests.

In the case of *Great Northern vs. City of Minneapolis,* 161 N. W. 231, 233, in passing on this question in an eminent domain proceeding the court said:

> "The test is whether the publication was of such a character as to create a reasonable presumption that if the owner is present and taking care of his property, he will receive the information of what is proposed and when and where he may be heard."

In 2 Lewis Eminent Domain (3rd Ed.) Sec. 568, page 1012, in regard to the manner or time of posting or publishing notice, in order to satisfy the requirements of the constitution, it is said that "no definite rule is laid down by the authorities. Any statutory provision in this respect which did not savor of bad faith would probably be upheld."

In *Hanover National Bank vs. Moyses,* 186 U. S. 181, 192; 46 L. Ed. 1113, the constitutionality of the bankruptcy act was attacked, upon the ground that "the notice provided by the act (10 days) is unreasonable," and did not amount to due process of law. Chief Justice Fuller, in overruling this contention, said:

> "Considering the plenary power of Congress, the subject matter of the suit and the common rights and interests of the creditors, we regard the contention as untenable. Congress may prescribe any regulations concerning discharge in

bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law, and we cannot find any thing in this act on that subject which would justify us in overthrowing its action."

It was held in *North Laramie Land Co. vs. Hoffman,* 268 U. S. 276, 285; 69 L. Ed. 953, 958, that notice of initiation of proceedings for the establishment of a public road by publication for three successive weeks in three successive issues of a paper published in the county, satisfies all requirements of the Federal Constitution as to due process of law, saying:

"All persons are charged with knowledge of the provisions of statutes, and must take note of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application—facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of pro-

ceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter, and afford to the property owner reasonable opportunity, at some stage of the proceedings, to protect his property from an arbitrary or unjust appropriation."

In the case at bar the notice was published for three successive weeks in three successive issues of a paper published in Chelan County (T. 146, 15, 16).

It was held in *Dryer vs. Mayor of Baltimore,* 140 Fed. 880, in a condemnation suit by the City of Baltimore to acquire property for harbor and dock purposes, that the provisions of the statute requiring two weeks' notice by publication of the meeting of the Commission to assess damages to property owners, after the plans for the improvement had been adopted, four days' notice of the time set for reviewing the assessment after it had been made, and two weeks' notice of the right to appeal, were reasonable with respect to the length of notice, and did not violate the constitutional rights of a property owner.

In the case of *Tuller vs. City of Detroit,* 56 N. W. 1032, an action by the City of Detroit to condemn property for street purposes, it was held that the publication of the summons for five days in five successive issues of the daily paper, complied with the statute and the constitution.

The Supreme Court of Washington has held that the Washington statute does not regulate the return date and that a return day eighteen days from the date of the first publication is not unreasonable. This court is of course bound by the state court's interpretation of the Washington statute. Moreover the decision of the Washington court on this question is in accordance with the weight of authority that the time is computed from the date of the first publication. *House vs. Road Improvement Dist. No. 5,* 266 U. S. 175, 177; 69 L. Ed. 229, 230; *Newman vs. Lynchburg Inv. Corporation,* 236 U. S. 692, 695; 59 Law Ed. 792, 795; *Nishnabotna Drainage District vs. Campbell,* 55 S. W. (Mo.) 276; *Harrison vs. Newman,* 80 Pac. (Kans.) 599.

In the case of *New Whatcom vs. Bellingham Bay Improvement Co.,* 16 Wash. 131, 134, an action to enforce a reassessment of the costs of a local improvement, the statute required objections to the assessment roll to be made within ten days from the last publication of the notice, and that notice be published in three successive issues of the official paper of the city. It was contended that the time was so short as to amount to lack of due process of law. The case finally reached this court where it was held that the ten days' notice was not unreasonably short, the court

saying, "And especially is this true when the Supreme Court of the state in which the proceedings were had has ruled that it was sufficient." Quoting further from that case:

> "It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time. The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when and where he may be heard.
>
> "And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections. Here no question is made of the form of the notice. It was published in three successive issues of the official paper of the city. So the statute required. What more appropriate way of publishing the action of a city than in its official paper? Where else would one interested more naturally look for information? And is not a repetition in three successive issues of the paper sufficient? How seldom is more than that required!"

Bellingham Bay & B. C. Railroad Co. vs. City of New Whatcom, 172 U. S. 314, 319; 43 L. Ed. 460.

In the case of *Security Savings Bank vs. California,* 263 U. S. 282, 290; 68 L. Ed. 301, 308, the court says:

> "The highest court of the state deemed the prescribed publication reasonable notice. The question is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts."

Not only was the publication made in this case, and the time that elapsed between the first publication and the return day, sufficient to enable the appellant, if she was watching her property in the manner that the law presumes she will watch it, to appear in court and protect herself but she actually did appear three days prior to the time the notice required her to do so and objected because she did not have longer notice. And after that she had almost five months within which to prepare for trial.

What is reasonable notice is in the nature of a mixed question of law and fact. The fundamental requisite of due process of law is the opportunity to be heard. *Grannis vs. Ordean,* 234 U. S. 385, 394; 58 L. Ed. 1363, 1369. Appellant not only had the opportunity to be heard but she was heard. From a practical standpoint the notice was sufficient because it

resulted in getting appellant into court. Similar protests by litigants who claimed insufficient notice but who actually were in court in time to protect their interests were held to be lacking in merit in *Tyler vs. Judges of Court of Registration,* 179 U. S. 405, 409; 45 L. Ed. 252, 254; *Brophy vs. Kelly,* 211 Fed. 22, 28; *Nysewander vs. Lowman,* 24 N. E. 355.

A thorough examination of the authorities cited by appellant on this branch of the case discloses that many of them relate to statutes that are entirely different from the eminent domain statute in force in the State of Washington, that others are not in point, do not sustain appellant's contention, support respondent's position, or are not in accord with the decisions of this court.

The case of *Early vs. Homans,* 16 How. 616, 14 L. Ed. 1079, cited by appellant, not only does not support her contention, but sustains the position of respondent. Appellant in the case at bar contends that a statute requiring publication of a notice "once a week for two successive weeks" requires a lapse of two full weeks and ten days after the last publication before the notice becomes effective. The statute in the Early case provided for sale upon a return day, after advertisement "once in each week for at *least* twelve successive weeks." This court said:

"We do not doubt if the statute had been 'once in each week for twelve successive weeks,' the previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient."

This distinction was followed in the next case cited by appellant, *Leach vs. Burr,* 188 U. S. 510, 512; 47 L. Ed. 567, 568. Similar language was used in the statute construed in *Foster vs. Vehmeyer,* 133 Cal. 459; 65 Pac. 974. The following cases cited by appellant are not in point:

Security Trust Co. vs. Lexington, 203 U. S. 323, 51 L. Ed. 204, holds that the plaintiff had had an opportunity to be heard upon a question of lack of notice; that having been heard and the assessment reduced it had obtained all the hearing it was entitled to.

Central of Georgia Ry. Co. vs. Wright, 207 U. S. 127, 52 L. Ed. 134, holds that an assessment of capital stock of a railway without notice of hearing denied due process of law.

L. & N. R. R. Co. vs. Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, holds that a statute requiring a carrier to deliver its own cars to another carrier which did not protect the owner from loss or undue de-

tention of cars, violated the due process clause. The question of notice was not considered.

Coe vs. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 412, holds that a statute failing to provide for notice, hearing or opportunity to be heard prior to execution against a stockholder for unpaid subscriptions, when a return of *nulla bona* had been made on an execution against a corporation did not afford due process of law.

Wuchter vs. Pizzutti, 276 U. S. 13, 72 L. Ed. 446, holds that a statute providing in actions against non-residents for damages on account of automobile accidents, service could be made upon the Secretary of State without any reasonable provision being made for service of notice upon such non-residents, violates the Fourteenth Amendment.

Southern Ry. vs. Simon, 184 Fed. 959, relates to service on foreign corporations by serving the Secretary of State, without any provision being made for notice to the foreign corporation, and was held violative of the due process clause.

The quotation from *In re Meyer*, 158 Minn. 433, 197 N. W. 770, is from the first opinion of the Minnesota Supreme Court, afterwards reversed on rehearing, 199 N. W. 746.

Boad vs. Penn. R. R. Co., 124 Minn. 181, 144 N. W. 942, holds that an action commenced by the placing of a summons in the hands of a Minnesota sheriff and completed within a year, was within the period prescribed by the Pennsylvania statute of limitations.

State vs. Morrison, 132 Minn. 454, 157 N. W. 706, holds that a notice in a highway proceeding, returnable at a special term to be held August 24th, was valid when heard August 31st, the actual day of holding the special term:

> "The relator was not so misled that the opportunity to fully assert his rights was in any manner lost to him; for he was present with his attorney on such special term day as well as on the 24th."

Auerbach vs. Maguard, 26 Minn. 420, holds that under a statute providing for publication of a summons in an attachment proceeding, it was necessary to publish for six consecutive weeks and that the action was not commenced by one publication only.

Coe vs. North Wisconsin Lbr. Co., 92 Wis. 141, 31 N. W. 1130, is not in accord with the holding of this court in *Early vs. Hommes*, *supra*.

The Washington Statute has been in effect for 39 years. A court should be slow to overturn a statute that has been enforced for such length of time, under

which thousands of condemnation suits have long brought and property rights of great value determined. In answer to a similar contention, the Supreme Court of Michigan said in *Continental Improvement Co. vs. Phelps*, 11 N. W., 396:

> "It is now more than ten years since the act was passed and dovetailed into our system of important statutes. The people and the government have acquiesced in it as a piece of legislation lawfully enacted, and interests of vast magnitude have meanwhile sprung forth and flourished under it. The whole country has acted on the faith that it originated legitimately and constituted a valid statute; and if we were satisfied that the legislature stumbled and overlooked something, which a nice regard for the claim referred to would have prompted, we should deem it our duty to yield to the long practical construction and acquiescence and decline to set up a view which would rend both and overturn the statute and uproot and destroy an array of interests it would be difficult to either measure or sunder."

B. The Power of the Chelan Electric Company to Condemn Is Not Affected by the Fact that Another Public Service Corporation will Distribute the Power to the Consumers.

Appellant's contention is succinctly stated by the Supreme Court of the State of Washington:

> "It is claimed that the use contemplated in this case is not a public use because the Chelan Electric Company has no transmission line nor any customer except the Washington Water Power Company, which owns practically all of the stock of the Chelan Electric Company. That

situation is explained in the *Getty* case. The Washington Water Power Company is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned there is no question about the public use to which the property will be put." (T. 143.) (Findings of Fact T. 49-57.)

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129; 259 Pac. 279.

In the *Getty* case, the Supreme Court summarized the relationship of the Washington Water Power Company to the Chelan Electric Company:

"Ballster is a public service corporation which desires to expropriate the right to overflow certain lands of the respondents for the purpose of raising the surface of Lake Chelan, and thereby developing a large amount of electric energy. The primary purpose of the corporation appears to have been to furnish motive power for the operation of the trains of the Great Northern Railway Company, but, owing to the fact that the Railway Company has not yet started the development of its properties for that purpose, it was deemed better to allow the development of the power site to be handled by a company already actively engaged in that business, and which would have immediate demand and sale for the energy thus produced. To this end all of the stock, save five qualifying shares, were sold to the Washington Water Power Company, which company agreed to develop the project and sell electricity to the railroad, when and as it became needed through the electrification of its railroad lines.

"The Washington Water Power Company, which thus became practically the sole owner of the relator company, has been engaged in business in this state for many years supplying electrical energy to a very large extent in eastern Washington, and to a lesser extent in the neighboring state of Idaho. It has five water power sites on the Spokane River in this state and one in Idaho. It supplies electric energy to other public service corporations for the operation of railways and electric lines, furnishes power to municipalities and the inhabitants thereof for lighting streets and homes, as well as supplying power for general uses. Its present capacity of electric energy is insufficient for the demands made upon it, and, in 1925 and 1926, it was obliged to purchase power to avoid a shortage. To overcome the shortage and comply with new contracts, it is seeking to develop the Lake Chelan project. The power produced at this project will be delivered to it, and from it to its customers in the State of Washington."

After referring to its earlier decisions, the court says:

"This state has by statute, since that time, created the Public Service Commission with a duty upon it of regulating the service given and the rates charged by such companies as the relator, and it has submitted itself to that jurisdiction. The rights of the public to the use and enjoyment of electric power are, therefore, regulated, guaranteed and safeguarded by proper legislation, and public necessity requires that in fulfilling the duties it owes to the public generally, it be granted the right of eminent domain."

State ex rel. Chelan Electric Co. vs. Superior Court of Chelan County, 142 Wash. 270; 253 Pac. 115.

There is very good reason for the Chelan Electric Company delivering the electricity generated by the Chelan plant to the Washington Water Power Company for distribution and sale. Under the Federal Water Power Act (Act of Congress, approved June 10, 1920, 41 Stat. 1063), the government reserves the right at the end of the license period, which is in this case fifty years, to recapture the whole project from the licensee upon the payment of certain sums of money. The project boundaries and the lands included in the project are specifically designated in the license and in the papers and maps which must be furnished to the Federal Power Commission upon the completion of the project. It is, therefore, wise to keep the Chelan project as a whole in the ownership of a company entirely separate from the Washington Water Power Company except in its stock ownerships. (T. 159-175.)

Such an arrangement also simplifies the methods of accounting. Under the Federal Water Power Act, there are certain provisions whereby, in case the earnings of the plant exceed a certain predetermined amount, the government recaptures the excess earnings. For this additional reason it is wise to keep

the Chelan project separate from the other plants and properties of the Washington Water Power Company.

The fact that the Chelan Electric Company will deliver the power generated at Lake Chelan to the Washington Water Power Company for distribution does not affect the right of the former to condemn. The right of eminent domain may be exercised by a company which is not to serve the public directly but is to furnish a needed facility to other public service corporations through which the public actually enjoys the use. *Beckman vs. Lincoln & N. W. R. R. Co.,* 112 N. W. 348, 350; *Dietrichs vs. L. & N. W. Ry.,* 13 Neb. 361, 13 N. W. 624; *Gottschalk vs. L. & N. W. R. R. Co.,* 14 Neb. 389, 15 N. W. 695; *C. & W. I. R. R. Co. vs. Ill. Cent. Co.,* 113 Ill. 156; *Lower vs. C. B. & Q. R. R. Co.,* 59 Ia. 563, 13 N. W. 718; *Chicago Co. vs. People,* 153 Ill. 409, 38 N.E. 1075; *Fort Street Union Dept. Co. vs. Morton,* 83 Mich. 265, 47 N. W. 228; *Calor. Oil & Gas Co. vs. Franzell,* 33 Ky. Law. 98, 109 S. W. 328; *Riley vs. Charleston Union St. Co.,* 71 S. C. 457, 51 S. E. 485; *Ryan vs. Louisville & N. Terminal Co.,* 102 Tenn. 111, 50 S. W. 744; *Southern Ill. & M. Bridge Co. vs. Stone,* 174 Mo. 1, 73 S. W. 453; *Southern Ill. & M. Bridge Co. vs. Stone,* 206 U. S. 267, 51 L. Ed. 1057; *State ex rel. Dominick vs. King*

County Superior Court, 52 Wash. 196, 100 Pac. 317; *State ex rel. Trimble vs. Superior Court,* 31 Wash. 445, 72 Pac. 89.

In *State ex rel. Dominick vs. King County Superior Court, supra,* the court said:

> "Does the fact that the respondent will sell and deliver a portion of its electrical power to third persons and corporations to be by them used for public and municipal rights and in the operation of railroads and railways, afford a sufficient reason for denying to it the right of eminent domain? We think not. Courts look to the substance rather than to the form, to the end rather than to the means. If in the end the property is to be devoted to a public use, the manner, agency or instrumentality through which that result is accomplished is a matter of no concern."

Cases involving analogous situations have been decided by this court.

In the case of *Clark vs. Nash,* 198 U. S. 361, 49 L. Ed. 1085, a statute of Utah authorizing the taking of private property for an irrigation ditch, was upheld, the court holding that the use was a public one, although for the benefit of only one land owner. The court in that case recognized a principle which it has adhered to closely ever since: that the character of the use, whether public or private, depends largely upon local conditions, with which the people of the particular state are more familiar than anyone else,

and consequently the Federal Supreme Court should be slow to declare a use private which local statutes and decisions recognize as public. The court said:

> "But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the state which, in all probability, would flow from a denial of its validity. These are matters which

might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine, that is material; other facts might exist which are also material—such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where water is needed for that purpose. The general situation and amount of the arid land or of the mines themselves might also be material, and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary water in any other way than by the condemnation in his own behalf, and not by a company, for his use and that of others."

The case of *Strickley vs. Highland Boy Gold Mining Co.,* 200 U. S. 527, 50 L. Ed. 581, was begun by a mining corporation in Utah to condemn a right of way for an aerial bucket line and supporting towers across a placer mining claim. A statute of Utah provided that the right of eminent domain might be exercised for tramways, etc., "to facilitate the milling, smelting, or other reduction of ores, or the working of mines." The mining corporation desired to use the line to carry ores for itself and others from its mines. The court said :

"The question, thus narrowed, is pretty nearly answered by the recent decision in *Clark vs. Nash,* 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment which prevents a state from requiring such concessions. If the state constitution restricts the legislature within narrower bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

"In the opinion of the legislature and the Supreme Court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong. If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff is a carrier for itself and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears."

On March 12, 1906, this court handed down a direct holding that a state statute, giving mill owners the right to construct dams and overflow property to develop water power for manufacturing purposes, is valid and does not contravene the Fourteenth Amendment. *Otis Co. vs. Ludlow Mfg. Co.,* 201 U. S. 140, 50 L. Ed. 696. The court said:

> "The only question which it is necessary for us to consider is whether the act as construed violates the Fourteenth Amendment. *General objections to mill acts as taking property for private use or on other grounds have been disposed of by Head vs. Amoskeag Mfg. Co.,* 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441. See further, *Clark vs. Nash,* 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676; *Strickley vs. Highland Boy Gold Mining Co.,* 200 U. S. 527, *ante,* 581; 26 Sup. Ct. Rep. 301. Such acts have been in force in Massachusetts ever since an act of 1714, chap. 15, 1 Prov. Laws, 729. The practice sanctioned by them would seem, from the recitals of that act, to have been still older. It may have begun with grist mills and may have had its justification in the public needs which exempted from military watchings and wardings one miller to each grist mill (act of 1693, chap. 3, Par. 13, 1 Prov. Laws, 130); and in the public duties which were expressed in the act of 1728, chap. 6, Par. 3, 1 Prov. Laws, 497. But, at all events, the liability of streams to this kind of appropriation and use has become so familiar a conception in New England, where water power plays as large a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the nature of property in streams, as there understood."

In *Mount Vernon-Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co.*, 240 U. S. 30, 60 L. Ed. 507, the court says:

> "The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. *The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force.* In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. *But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is.* The inadequacy of use by the general public as a universal test is established. *Clark vs. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; *Strickley vs. Highland Boy Gold Min. Co.*, 200 U. S. 527, 531, 50 L. Ed. 581, 583; 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. The respect due to the judgment of the state would have great weight if there were a doubt. *Hairston vs. Danville & W. R. Co.*, 208 U. S. 598, 607, 52 L. Ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; *O'Neill vs. Leamer*, 239 U. S. 244, 253, *ante*, 249, 265, 36 Sup. Ct. Rep. 54. *But there is none.* See *Otis Co. vs. Ludlow Mfg. Co.*, 201 U. S. 140, 151; 50 L. Ed. 696, 705; 26 Sup. Ct. Rep. 353."

Hairston vs. Danville & W. R. Co., 208 U. S. 598, 52 L. Ed. 637, was an action to condemn a right of way for a spur track. Discussing the contention that the condemnation was not for a public use, the court said:

> "The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. . . . The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified and acted upon in *Fallbrook Irrig. District vs. Bradley; Clark vs. Nash;* and *Strickley vs. Highland Boy Gold Min. Co., ubi supra.* What was said in these cases need not be repeated here. No case is recalled where this court has condemned, as a violation of the Fourteenth Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws. In *Missouri P. R. Co. vs. Nebraska, ubi supra,* it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for

> which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; *or of the right to flow the land of another by the erection of a dam.*"

In another spur track case, *Union Lime Co. vs. C. & N. W. R. Co.*, 233 U. S. 211, 58 L. Ed. 924, the court said:

> "The state through its highest court declares the use to be a public one and we should accept its judgment unless it is clearly without ground."

III. The transmission of power generated at Lake Chelan in the State of Washington into the State of Idaho is not an issue in this case, both the trial and the State Supreme Court having found as a fact that none of the Chelan power will be used in Idaho.

The trial court found that none of the electric energy to be generated by respondent at its projected plant will be used in Idaho. (T. 57.) Upon appeal the Supreme Court of Washington affirmed this finding. *State ex rel. Woodruff, et al. vs. Superior Court, supra* (T. 143), 145 Wash. 129, 137; 259 Pac. 379, 382; *State ex rel. Chelan Electric Co. vs. Superior Court of Chelan County* (Getty case), 142 Wash. 270, 253 Pac. 115.

The use was held to be a public use within the meaning of the Constitution and statutes of the State of Washington, because all of the electric energy was to be used within that state.

Appellant says the respondent intends to transmit the power into the State of Idaho, notwithstanding the contrary conclusion of the state court. (Tr. 57, 263, 264.) Under such circumstances, it will be presumed that there was evidence tending to support the finding of the lower court. *Hanson vs. Boyd*, 161 U. S. 397, 40 L. Ed. 746; *Clarke vs. Pennsylvania*, 139 U. S. 395, 32 L. Ed. 497; *Coppuntan vs. Savage*, 14 Wall. 776, 20 L. Ed. 862.

If the evidence were certified it would be found to be conflicting. In the opinion of the Supreme Court of Washington in the case at bar it is stated:

> "Further, it is said that the use is a private use and that there is no right or power of eminent domain, because the electric energy produced at the Lake Chelan plant will be used in Idaho. The same contention was made in the *Getty* case. (*State ex rel. Chelan Electric Co. vs. Superior Court*, 162 Wash. 270; 298 Pac. 113.) . . . Admitting the record and conclusion in that case, relators now say that the proof is different in the present case, that they have now furnished additional evidence in support of their claim. But, as has the condemnor introduced evidence additional to that it relied on in the other case, and upon all

> of it, *conflicting as it is,* the trial court has again found that none of the energy so produced will flow into Idaho."

This court has steadfastly refused to weigh conflicting testimony. *Great Northern Ry. Co. vs. Donaldson,* 246 U. S. 121, 62 L. Ed. 616; *U. S. vs. Johnstone,* 268 U. S. 220, 69 L. Ed. 925.

The highest court of the state having declared the use to be a public use, and the evidence not having been incorporated in the record, this court will accept the judgment of the state court, there being nothing upon which to base a finding that the decision of the lower court is clearly without ground. *Clark vs. Nash,* 198 U. S. 361, 49 L. Ed. 1085; *Union Lime Co. vs. C. & N. W. R. Co.,* 233 U. S. 211, 58 L. Ed. 924; *Fallbrook Irrigation District vs. Bradley,* 164 U. S. 112, 41 L. Ed. 369; *Hairston vs. D. & W. R. Co.,* 208 U. S. 598, 52 L. Ed. 637.

IV. All of the Chelan Power Will Be Devoted to Public Uses.

Under the heading "whether the purpose of the taking constituted a public use" the appellant has argued the negative, contending that it is not a public use because the Washington Water Power Company, another public service corporation, rather than respondent, is to distribute the power, and that some of the power is to be used in Idaho. The contention

is not made directly that the use to be made of the power, as found by the state court, aside from the two uses just mentioned, is not a public use within the meaning of the Constitution of the United States. However, because of the importance of the question, we will refer briefly to the authorities on this point.

The trial court found that the Washington Water Power Company will distribute for the petitioner the electric energy to be generated at Lake Chelan; that the Washington Water Power Company furnishes electric energy to corporations operating lines of railroad and electric railways in towns, cities and counties of the State of Washington; that it furnishes electric energy for municipalities of the state, lighting the streets and avenues, houses and homes thereof; that it has a contract to supply the Great Northern Railway Company with electric energy to operate its trains as soon as it electrifies between Wenatchee, Washington, and Troy, Montana; that it supplies electric energy for other public uses (many of which are enumerated in the companion case heretofore referred to as the *Getty* case (*State ex rel. Chelan Electric Co. vs. Superior Court,* 142 Wash. 270; 253 Pac. 115); that in the years 1925 and 1926 the power produced by the hydro-electric plants of the Washington Water Power Company was insufficient to supply the

needs of its customers and that it was obliged to purchase power from other companies in order to avoid a shortage. (T. 55.) The court then finds:

> "That the entire output of electric energy distributed and sold, and to be distributed and sold by the Washington Water Power Company, including the power to be produced by the proposed hydro-electric plant on the Chelan River, is, and will be devoted to a public use, and the object for which the lands, real estate, premises and property of the respondents are sought to be appropriated is, and will be a public object and use, and the public interest requires and will require the prosecution of the enterprise of the petitioner." (T. 59.)

The evidence not having been certified to this court, there is nothing before the court upon which it can review the question of public use. Under these circumstances it will be presumed that there was evidence to support the finding of the lower court. *Hansen vs. Boyd, supra; Clarke vs. Pennsylvania, supra; Capperton vs. Bowyer, supra.*

The highest court of the state having declared the use to be a public use, and the evidence not having been incorporated in the record, this court will accept the judgment of the state court, there being nothing upon which to base a finding that the decision of the lower court is clearly without ground. *Clarke vs. Nash, supra; Union Lime Co. vs. C. & N. W. R. Co.,*

supra; Fallbrook Irrigation District vs. Bradley, supra; Hairston vs. D. & W. R. G. Co., supra.

This court regards with great respect the judgments of state courts upon what should be deemed public uses in any state. *Rindge Co. vs. Los Angeles County,* 262 U. S. 700; 67 L. Ed. 1186, 1192.

In the case of *Hairston v. Danville & W. R. Co.,* 208 U. S. 598; 52 L. Ed. 637, it is said:

> "No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws."

The contention was made in the *Getty* case that the uses appellant intends to make of the Chelan power are not public uses. The decision of the Supreme Court of Washington on that question in the *Getty* case and again in the case at bar makes the finding of public use in those cases the established law of that state.

> *State ex rel. Chelan Electric Co. vs. Superior Court,* 142 Wash, 270; 253 Pac. 115. (For decision in case at bar see T. 142.)

Article XXI of the Constitution of the State of Washington provides:

> "The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use."

The holding in *State vs. White River Power Company,* 39 Wash. 648; 82 Pac. 150 (relied on by appellant) that the above provision of the constitution of the state of Washington, in so far as it might be construed as authorizing condemnation for manufacturing purposes, was in conflict with the 14th Amendment to the constitution of the United States, has been modified and changed by the later decisions of the state court in *State ex rel. Chelan Electric Co. vs. Superior Court, supra,* and *State ex rel Woodruff vs. Superior Court, supra,* (T. 142) and is no longer the law in Washington.

The early decisions in *Kaukauma Water Power Co. vs. Green Bay Canal Co.,* 142 U. S. 254; 35 L. Ed. 1004, and *Missouri Pacific vs. Nebraska,* 164 U.S. 403; 41 L. Ed. 489, relied upon by the Supreme Court of Washington in the *White River* case have been clarified by the later decisions of this court in *Clark vs. Nash, supra; Strickley vs. Highland Boy Gold Mining Co,. supra; Otis Co. vs. Ludlow Mfg. Co., supra; Mount Vernon-Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co., supra; Hendersonville Light & Power Co. vs. Blue Ridge Interurban Ry. Co.,* 243 U. S. 563; 61 L. Ed. 900; *Hairston vs. Danville & W. R. Co., supra; Union Lime Co. vs. C. & N. W. R Co., supra.*

The State of Washington possesses one-sixth of the total water power of the United States (*State ex rel Chelan Electric Co. vs. Superior Court,* 142 Wash. 270, 281; 253 Pac. 115, 119). Its future growth and prosperity must rest in a large degree upon the development of that resource. Enlightened public thought agrees that the best interests of the public are preserved by allowing such development to be made by public service corporations under public regulation. The respondent (petitioner) and the prospective distributor of the power in the present case are of that class.

The Federal Water Power Commission (T. 159-175), the Supervisor of Hydraulics and the Board of State Land Commissioners of the State of Washington (T. 50, 60, 61) have approved the project. It has been declared to be for a public use by the highest court of the state. The objections now made by the one remaining litigant out of the large number that originally contested the right of respondent to condemn are not so much to prevent the power development as to obtain by coercion a higher price for her property than a jury would award. It is respectfully submitted that, with the support of the state constitution and the action that has been taken by the Federal government and coordinate branches of the govern-

ment of the State of Washington, and under the decisions of the Supreme Court of Washington in this and companion cases, and in view of the more recent decisions of this court, it should be held (if the court finds that it can pass upon this question at all in the absence of a transcript of the evidence) that the use which respondent intends to make of appellant's property is a public use within the meaning of the constitution of the United States.

V. The description of appellant's land is sufficiently definite, whether service was made personally or by publication.

Appellant argues that the description of the property sought to be condemned is insufficient, in that the notice and petition do not describe the same with reasonable certainty and that for this reason she was deprived of her property without due process of law.

The notice and petition recite, in substance, that it is necessary that the petitioner "acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River, and to raise the same to the maximum elevation of 1100 feet above mean sea level, and to inundate and overflow to the maximum elevation of 1100 feet above mean sea level, the following described real estate situated in the County of Chelan, State of Washington, particularly described as follows, to-wit." And then follows a detailed description of the

property which petitioner seeks the right to overflow to the said elevation. (T. 15-18; 3-9.)

In the last paragraph of the notice (and paragraph 7 of the petition) it is recited "that the object of said proceeding is to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioner . . . for the taking or injuriously affecting the lands, real estate and other premises above described, in the manner set forth in said petition, and for a release from all liability for all damages to said lands, real estate and premises, in any manner arising from the *impounding* and *storing* of the waters of said Lake Chelan and the Chelan River and raising the same to the maximum elevation of 1100 feet above mean sea level." (T. 15-18.) The prayer of the petition is in conformity with these recitations in the notice. (T. 3-9.)

Appellant complains that the notice flagrantly disregards a statute of the State of Washington requiring that the notice contain "a description of the land" sought to be appropriated. (Appendix 55, Appellant's Brief.) Two months before the trial on the question of damages, in compliance with a motion made by appellant, a bill of particulars was furnished giving a surveyor's description by metes, bounds, courses, de-

grees, angles and acreage of the property sought to be condemned. The description covers over six full pages of the printed transcript. (T. 39-41. 75-81.)

By the order of public use and necessity (T. 63, 64) the respondent was given "the right in perpetuity, to inundate and overflow to the maximum elevation of 1100 feet, *still water measurement,* above mean sea level," the lands described in the notice and petition "together with the right in perpetuity, to damage the above described land by wave wash, erosion, seepage, inundation or any similar cause as a result of holding the waters of Lake Chelan up to a maximum elevation of 1100 feet, *still water measurement,* above mean sea level." A bill of particulars having been furnished before trial giving a metes and bounds description of the land to be actually overflowed, the judgment on the verdict compensates the appellant for damages to her land actually overflowed and for damage to contiguous lands (which were included in the description contained in the original notice and petition as well as in the bill of particulars) by wave wash, erosion, seepage, inundation or any similar cause. (Tr. 101, 102, 104, 105, 114, 115, 125-133.)

With respect to appellant's contention that the description contained in the published notice was insufficient to give the court jurisdiction the Supreme Court of Washington says:

"It is assigned that the property in each case is not described with reasonable certainty and that therefore the trial court obtained no jurisdiction. The descriptions are long and need not be set out in this opinion. An examination of them, however, satisfies us that they are sufficient to satisfy all questions of jurisdiction as the same affects the rights of resident owners upon whom personal service was had, or the rights of any non-resident owner upon whom service was had by publication of notice. In substance the descriptions are like the one held to be sufficient in the *Getty* case. (*State ex rel. Chelan Electric Co. vs. Superior Court,* 142 Wash. 270; 253 Pac. 115.) In this connection it is further claimed that the court erred in denying motions to make the petitions more definite and certain. It appears, however, that with such motions the relators filed motions for bills of particulars for the same purpose and that the order denying the first motions granted the second ones which have been complied with by the petitioner by the giving of minute detailed descriptions by metes and bounds in each and all of the cases of the lands to be flooded." (T. 144.)

State ex rel Woodruff vs. Superior Court, 145 Wash. 129; 259 Pac. 379.

In its decision the Supreme Court of Washington was interpreting a state statute. While Sec. 921 Remington's Compiled Statutes of Washington (Appendix p. 98), requires that the petition describe the lands sought to be condemned "*with reasonable certainty*" Sec. 922 (Appendix, p. 99), merely requires that a notice be served "*containing a description of the land.*" The decision of the Washington Supreme Court on this question is to the effect that the description in the notice is sufficiently definite to comply with the Washington statute. The construction given to a statute of a state by the highest tribunal of such state is regarded as a part of the statute and is as binding upon the courts of the United States as the text. *N. P. Ry. Co. vs. Meese, supra; C. & N.W.R. Co. vs. Nye Schneider-Towler Co., supra; Tullis vs. S.W. & W. R.R. Co., supra; Bucher vs. Cheshire Ry., supra; Leffingwell vs. Warren, supra.*

The Supreme Court of Washington did not hold, and there is nothing in the record to show that it was asked not to hold, that the description of the land in the notice was sufficient to constitute due process under the constitution of the United States. But assuming for the sake of argument that the state court did decide this federal question, under the principles stated in the authorities already cited, the description in the notice was sufficient to constitute due process.

"The test is whether the publication was of such a character as to create a reasonable presumption that if the owner is present and taking care of his property, he will receive the information of what is proposed and when and where he may be heard."

G. N. Ry. vs. City of Minneapolis, 161 N. W. 231, 233.

"The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed, and when and where he may be heard."

Bellingham Bay & B. C. Railroad Co. vs. City of New Whatcom, 172 U. S. 314, 319; 43 L. Ed. 460.

"Of what concerns, or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises."

Ballard vs. Hunter, 204 U. S. 241, 262; 51 L. Ed. 461, 474.

See also:

Huling vs. Kaw Valley R. & Imp. Co., 130 U. S. 559; 32 L. Ed. 1045; *Windsor vs. McVeigh,* 93 U. S. 274; 23 L. Ed. 914; *Goodrich vs. Ferris,* 214 U. S. 71; 53 L. Ed. 914; *Chehalis vs. Centralia,* 77 Wash. 673, 676; 138 Pac. 293; *Spokane Valley Land & Water Co. vs. Jones,* 53 Wash. 37, 43; 101 Pac. 515; *C. & A. R. Co. vs. Pontiac,* 48 N. E. 485; *State ex rel. Burrows vs. Superior Court,* 48 Wash. 277, 281; 93 Pac. 423; *Empire Mill Co. vs. Dist. Co.,* 149 Pac. 499, 503; 2 *Lewis on Eminent Domain* (3rd Ed.), Sec. 549, p. 981.

The due process clause of the constitution of the United States does not require any particular style, form or length of notice. What is required is that a party shall have reasonable notice and an opportunity to be heard before the issues are decided against him. 12 *Corpus Juris,* page 1232. We submit the notice in this case was reasonable both as to length of time and as to description and that it not only gave appellant an opportunity to be heard upon the issues, but that she made the best of the opportunity by appearing in the action three days before she was required to do so. When she did appear she asked for a more definite description and received it.

VI. Form of Decree. Measuring Elevation of Lake at Still Water.

The nature of the rights upon appellant's land sought to be condemned, as described in the notice and petition, are discussed in the preceding subdivision of this brief. Appellant objects because when the bill of particulars was filed the respondent asked that the elevation of the lake be measured at still water, and complains because this issue was submitted to the jury and damages awarded upon this basis. (T. 104, 105, 114, 115, 125, 127.)

The description in the original notice and petition is of all appellant's lands abutting upon the shore of the lake and the object of the proceeding is stated in the notice to be, and the prayer of the petition is, that respondent be granted the right to overflow and inundate this tract of land to the 1100 foot elevation above mean sea level and for a release from all liability for damages to the entire tract resulting from thus impounding and storing the waters of the lake. (T. 15-18; 3-9.) In the bill of particulars this 1100 foot elevation is definitely located by measuring the lake at still water and it is stated that respondent seeks the right to damage contiguous land (being the remainder of the tract described in the original notice and petition lying immediately above the 1100 foot elevation)

by wave wash, erosion, seepage, inundation, or any similar cause as a result of impounding and storing the waters of the lake to the 1100 foot elevation measured at still water.

The object of the action stated in the notice, and the prayer of the petition, is to *impound* and *store* the waters of the lake to the elevation mentioned. It is a self evident fact that waters could not be impounded and stored to that elevation if they were to be measured at the crest of the highest wave in the roughest water. In other words, if the lake had to be kept down to a level which would prevent the highest wave in the roughest water from ever going above the 1100 foot elevation the waters of the lake would have to be impounded and stored at an elevation somewhat below 1100 feet. Since all that is required is that a property owner be given reasonable notice of the object of the action we respectfully submit the statement of the purpose of the proceeding being to acquire the right to *impound* and *store* the waters of Lake Chelan to the elevation of 1100 feet was sufficient notice to the appellant that it was intended to measure the elevation at still water.

It is a matter of common knowledge that engineers measure the elevation of a body of water by placing their measuring instrument within a box arranged in

such manner that the water within the box is still, although the surface of the water outside the box be rough and choppy.

To give to the language of the notice and petition its common and every-day meaning "to impound and store water and raise it to a maximum elevation of 1100 feet" means to confine it within an inclosure until it reaches an elevation of 1100 feet. Webster's International Dictionary so defines the word impound and defines the word pound as a "level stretch in a canal between locks." Both definitions convey the idea that the elevation is to be measured when the water is still.

Article VIII of the Federal Power License provides:

> "For the purpose of determining . . . . the amount of water held in and drawn from storage the licensee shall install and thereafter maintain a standard gauge or gauges as may be necessary to determine the variation of the level of Chelan Lake and the rates and volume of discharge of water therefrom." (T. 165.)

This question is relatively unimportant. Appellant was compensated upon the basis of 1100 feet still water measurement. (T. 115, 125-133.) She was not deprived of any substantive right but seizes upon this trifling technicality to obtain a reversal. The law does

not concern itself with trifles and we submit the trial court's interpretation of the notice and petition were reasonable and proper.

VII. Instructions Given and Refused.

Appellant complains on pages 43 and 44 of her brief of the giving of certain instructions by the trial court and the refusal to give instructions requested by appellant.

If there was error in the instructions or in the conduct of the trial, it cannot be made a ground of setting aside the decree if the court had acquired jurisdiction to render the decree. Error or irregularities in the suit do not take from it or its decree the attribute of due process. *Ballard vs. Hunter,* 204 U. S. 241, 255; 51 L. Ed. 461, 471, 474; *Central Land Co. vs. Laidley,* 159 U. S. 103, 40 L. Ed. 91.

The evidence to which these instructions might be applicable is not in the record. Their validity depends upon an examination of the testimony. Contentions which relate to occurrences at the trial cannot be considered in the absence of the evidence. The incorporation of the instructions into the record does not require their consideration by the court. The appellate court presumes that the charge was correct and responsive to the issues as developed by the evidence.

Jones vs. Buckell, 104 U. S. 554; 26 L. Ed. 841, *Met. R. R. Co. vs. Macfarland,* 195 U. S. 322, 49 L. Ed. 219; *U. S. ex rel. Kinney vs. U. S. F. & G. Co.,* 222 U. S. 283; 56 L. Ed. 200, *Krauss Bros. Lbr. Co. vs. Mellon,* 18 Fed (2nd) 369, *Dangelo vs. McLean Fire Brick Co.,* 287 Fed. 14, *Sharp vs. U. S.,* 280 Fed. 86, 89; *South Penn. Co. vs. Latshaw,* 111 Fed. 598; *Newport News & Old Point Ry. & Electric Co. vs. Yount,* 136 Fed. 589; *Duluth St. Ry. Co. vs. Speaks,* 204 Fed. 573.

VIII. The state court did not deny the right of removal. The constitutionality of the tax statutes of the State of Washington is not an issue.

One of the grounds of reversal relied upon by appellant is the alleged denial of the right of removal. This question is discussed in subdivision 4 of appellant's brief under the heading, "Whether the tax statutes are in conflict with the Constitution of the United States," it being appellant's contention that the effect of the tax statutes, as interpreted by the Supreme Court of the State of Washington, was to deny to her the right of removal granted by the Constitution of the United States.

The facts with reference to the question of removal are briefly as follows: Three days before the return day fixed in the notice appellant filed a special appearance and motion to quash. (T. 3, 13.) Fourteen days later (eleven days after the return day) ap-

pellant filed a notice, petition and bond for removal to the federal court. (T. 20, 24.) An order of removal was entered by the state court eight days later. T. 24.) Four days later (November 3, 1926) the federal court remanded the cause to the state court. (T. 34.)

The case was then continued from time to time until February 28, 1927 (T. 35, 36.) On the latter date appellant's motions to quash and to make the petition more definite and certain were denied and her demurrer overruled. (T. 41, 43.) The case was then tried on the question of public use and necessity, findings of fact, conclusions of law and a decree being entered by the trial court March 23, 1927. (T. 45-64.) On April 29, 1927 the Supreme Court of Washington ordered that a writ of certiorari issue to review the decision of the lower court on this question. (T. 194.)

While this phase of the case was before the Supreme Court (that question not being decided by the higher court until September 1, 1927 (T. 142), the case proceeded to trial in the lower court on the question of damages. The trial was begun June 23 and continued without objection on the part of appellant, and without a special appearance having been made by appellant, until noon of June 27 at which time respondent rested its case. Appellant immediately filed a

second petition and bond for removal without serving written notice of the same upon respondent. This second petition for removal was orally denied by the court on June 27 and a formal order entered denying the same on the following day. (T. 92-95.)

The second petition for removal (T. 86-89) is substantially identical with the first. (T. 20-23.) In both petitions it is alleged that:

> "The other respondent in said cause is Chelan County, Washington, a municipal corporation, and a citizen of the State of Washington; that said Chelan County is not a tenant, lienor, or encumbrancer, and has no right, title, interest or estate whatsoever in any of the land, real estate or other premises owned by said Alice Barbee Wick; that there are no taxes or other amounts due and owing by said Alice Barbee Wick to said Chelan County, and that the controversy between said Chelan Electric Co. and said Alice Barbee Wick is a separable and distinct controversy between said Chelan Electric Company and said Alice Barbee Wick, your petitioner herein, who are citizens and residents of different states, which can be wholly determined between said Chelan Electric Company and said Alice Barbee Wick without the presence in this action of said other respondent, viz.: said Chelan County, Washington, a municipal corporation."

The evidence has not been certified to this court and therefore all that is known of what took place at the trial must be gleaned from the papers filed in the case and the orders of the court.

The action is brought by Chelan Electric Company, a corporation of the State of Washington, against Alice Barbee Wick and Chelan County, Washington, a municipal corporation. In the petition it is alleged as required by Section 921, Remington's Compiled Statutes of Washington, that the names of each and every owner, encumbrancer and person or party interested in the property are "Alice Barbee Wick and Chelan County, Washington, a municipal corporation." (T. 3, 8.) These allegations were never stricken from the petition.

Chelan County has not been dismissed as a party either by the court or voluntarily by respondent Chelan Electric Company. Chelan County appeared by its counsel at the trial on the question of public use as well as at the trial on the question of damages. (T. 45, 125, 126.) The county joined in the motion made in the first removal proceedings to remand the case to the state court. (T. 25-27, 32, 33, 34.) The county filed objections to the second petition for removal on the ground, among others, that "the controversy is not one wholly between citizens of different states, that it is not a separable controversy, that Chelan County is a lienor or encumbrancer upon, and has a right, title, interest and estate in, the lands, real estate and premises owned by the said Alice Bar-

bee Wick, and sought to be taken in these proceedings" and that the county is further interested on account of the country road. (T. 175, 176.)

In the petition for removal there is no allegation of fraudulent joinder. In the order denying the second removal the court finds that there has been no fraudulent joinder, that it is not a separable controversy, that written notice of the presentation of the petition was not served upon the respondent, that Chelan County is a necessary and indispensable party, that the case had been removed once before and remanded and that no change in the status of the parties had occurred since its remand. (T. 95.)

After the second petition for removal was denied the trial proceeded with the introduction of evidence by appellant. The court instructed the jury how to ascertain and determine the compensation to be paid respondents (referring to both appellant and Chelan County by the general term "respondents," T. 101-108), the verdict was for full compensation "to be paid to the owners and all tenants, encumbrancers and others interested." (T. 114.)

In the certiorari proceedings before the Supreme Court of the State of Washington the appellant contended that Chelan County was improperly joined as a party defendant, depriving her of the right of

removal on account of diversity of citizenship. The Supreme Court held that two answers could be made to this contention:

> "First, at the time the action was commenced general taxes *due* the county were *outstanding and a lien* upon the property" and that the state statute requires "the petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested in the property" and that a copy be served upon each and every such person and, "second, the record shows that prior to the hearing herein by the trial court, relator Wick did remove the case against her to the federal court and, upon a hearing therein, that court promptly remanded the cause to the state court." (T. 145.)

On the appeal to the Supreme Court of Washington from the judgment on the verdict the appellant urged that it was error for the trial court to deny the second petition for removal. The Supreme Court again affirmed the trial court, holding that the second application was neither properly nor timely made, that the appellant did not give written notice of the filing of the petition as required by statute, that the case was non-removable on the petition when the action was commenced and could not be converted into a removable case except by the voluntary dismissal of Chelan County by the petitioner, that the case had been removed once and remanded and that

there was no claim of fraudulent joinder of parties defendant for the purpose of preventing removal.

Appellant contends that she was deprived of the removal by a tax statute of the State of Washington making taxes which had been levied but were not yet due and payable a lien upon the property. But this question is in no way involved in this case. The Supreme Court of the State of Washington finds that *"at the time the action was commenced general taxes due the county were outstanding and a lien upon the property"* and then interpreting the eminent domain statutes of the state, finds the county to have been a necessary and indispensable party. (T. 145, 205.) These conclusions of fact by the court of last resort of the State of Washington are not subject to re-examination by this court. *Louisville & N. R. Co. vs. Schmidt,* 177 U. S. 230, 337; 44 L. Ed. 747, 750; *C. M. & St. P. Ry. Co. vs. Risty,* 276 U. S. 567; 72 L. Ed. 703; *Knights of Pythias vs. Meyer,* 265 U. S. 30, 33; 68 L. Ed. 885, 888; *Saltonstall vs. Saltonstall,* 276 U. S. 260, 270; 72 L. Ed. 565, 568; *Carroll Co. vs. U. S.,* 18 Wall. 71, 82; 21 L. Ed. 771, 775.

The Supreme Court of Washington as well as other courts has held a tax lien to be an encumbrance and that the holder of a tax lien is a necessary party defendant in an eminent domain proceeding: *Green vs.*

Tidball, 26 Wash. 338; 67 Pac. 84; *North Coast Ry. vs. Hess,* 56 Wash. 335; 105 Pac. 853; *Linne vs. Bredes,* 43 Wash. 540; 86 Pac. 858; *DeVoe vs. Rundle,* 33 Wash. 604; 74 Pac. 836; 2 *Lewis on Eminent Domain,* (3rd Ed.), Sections 528, 535; *State vs. Easton & Amboy R. R. Co.,* 36 N. J. Law 181; *Logan vs. Luukinen,* 231 Pac. 184, 186 (Ore.).

The decision in *Gasaway vs. Seattle,* 52 Wash. 444; 100 Pac. 991, cited by appellant as authority for excluding Chelan County as a party defendant, arose under a special statute relating to cities which did not require that all encumbrancers be joined as parties defendant as is required by the statute involved in the case at bar.

Chelan County being a necessary and indispensable party under the laws of the State of Washington, the case was not separable as between it and the appellant Wick. Where the object of a suit is to condemn and appropriate to the public use a single tract of land, the controversy is not divisible because the two defendants own distinct interests and may be entitled to separate damages. One of them cannot remove the cause from the state court to the federal court. *Bellaire vs. B. & O. R. R. Co.,* 146 U. S. 117; 36 L. Ed. 910; *Kohl vs. U. S.,* 91 U. S. 367, 378; 23 L. Ed. 449, 453; *City of Washington vs. Columbus & C. N. R. Co.,*

53 Fed. 673; *C. & O. R. Co. vs. Cockrell,* 232 U. S. 146; 58 L. Ed. 544; *McCallister vs. C. & O. Ry.,* 243 U. S. 302, 310; 61 L. Ed. 735, 740; *Baker vs. Jacksonville Traction Co.,* 247 Fed. 718; *Maloney vs. Cressler,* 210 Fed. 104; *Beckwith vs. C. M. & St. P. Ry. Co.,* 223 Fed. 858; *Gulf & S. I. R. Co. vs. Gulf Refining Co.,* 260 Fed. 262; *Roberts vs. Underwood Co.,* 257 Fed. 583.

Counties are recognized as corporations and, being such, as citizens for the purpose of suits based on diverse citizenship in the federal courts: *Mercer vs. Cowles,* 7 Wall. 118; 19 L. Ed. 86; *Lincoln Co. vs. Luning,* 133 U. S. 529, 531; 33 L. Ed. 766; *Pearl R. Co. vs. Wyatt Lbr. Co.,* 270 Fed. 26; *Chicago etc. R. Co. vs. City of Spencer,* 283 Fed. 824; *Parks vs. Carriere Consol. School Dist.,* 12 Fed. (2nd) 37.

Appellant cannot claim error so far as the first removal proceedings are concerned, because the case was removed to the Federal court and remanded to the state court. An order of a federal district court remanding a cause to a state court is not subject to review by the Supreme Court of the United States, either directly or indirectly, or by a writ or error to the supreme court of a state. The action of the Federal District Court in remanding a cause is final and conclusive: *Matter of Matthew Addy Steamship Co.*

vs. Commerce Corporation, 256 U. S. 417; 65 L. Ed. 1027; *Pacific Live Stock Co. vs. Lewis,* 241 U. S. 440; 60 L. Ed. 1084; *Missouri Pacific Ry. Co. vs. Fitzgerald,* 160 U. S. 556, 581; 40 L. Ed. 536, 542; *McLaughlin Bros. vs. Hallowell,* 228 U. S. 278, 286; 57 L. Ed. 835, 839.

The first and second petitions for removal are identical. Appellant alleges facts indicating Chelan County was not a necessary party defendant. But the petition filed by respondent names "Chelan County, Washington, a municipal corporation" as one of the "owners, encumbrancers and persons or parties interested" in the property to be condemned.

The question of removability depends upon the allegations contained in the complaint or petition at the time the application for removal is made. A plaintiff may elect his own method of attack and the case which he makes in his complaint or petition determines the separable character of the controversy for the purpose of deciding the right of removal. If, under the state law, the case stated in plaintiff's complaint or petition is one in which the defendants are properly joined, this is decisive of the right of removal, there being no showing that the defendants were fraudulently joined for the purpose of preventing removal. *Wilson vs. Oswego Township,* 151 U. S.

56, 66; 38 L. Ed. 70, 75; *Torrence vs. Shedd,* 144 U. S. 527, 530; 36 L. Ed. 528, 531; *Brooks vs. Clark,* 119 U. S. 502-511; 30 L. Ed. 482, 485; *Brown vs. Trousdale,* 138 U. S. 389, 396; 34 L. Ed. 987, 990; *C. & O. R. Co. vs. Dixon,* 179 U. S. 131-140; 45 L. Ed. 121, 125; *Hayes vs. May Dept. Stores Co.,* 271 U. S. 318; 70 L. Ed. 965; *C. & A. R. Co. vs. McWhirt,* 243 U. S. 422, 425; 61 L. Ed. 826, 829; *McAllister vs. C. & O. Ry.,* 243 U. S. 302, 310; 61 L. Ed. 735, 741; *C. R. I. & P. Ry. vs. Dowell,* 229 U. S. 102; 57 L. Ed. 1090, 1095; *A. G. S. Ry. Co. vs. Thompson,* 200 U. S. 206, 214; 50 L. Ed. 441, 445; *L. & N. R. Co. vs. Wangelin,* 132 U. S. 599, 601; 33 L. Ed. 474, 475; *G. N. Ry. vs. Alexander,* 246 U. S. 276, 281; 62 L. Ed. 713, 716.

The petitions for removal do not contain any allegation of fraudulent joinder but even if there were such an allegation, the showing of fraudulent joinder must consist of a statement of the facts rightly leading to this conclusion, apart from the pleader's deductions. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issue of fraud that the state court is required to surrender its jurisdiction. A petition for removal, insufficient upon its face, may be denied by the state court. *Wilson vs. Republic Iron & S. Co.,* 257 U. S. 92, 97; 66 L. Ed. 144, 148; *C. & O. R. Co. vs. Cockrell,*

232 U. S. 146, 152; 58 L. Ed. 544, 547; *Southern Ry. Co. vs. Lloyd,* 239 U. S. 496; 60 L. Ed. 402; *Ill. Central Ry. Co. vs. Sheegog,* 215 U. S. 308; 54 L. Ed. 208; *C. R. I. & P. Ry. vs. Dowell, supra.*

The right to remove a case to the federal court is not contingent on the aspect the case may have assumed on the facts developed on the merits of the issue tried. When there is a joint cause of action against a defendant resident of the same state with the plaintiff and a non-resident defendant, it must appear, in order to make the case removable as to the non-resident defendant, because of a dismissal as to the resident defendant, that the dismissal as to the resident defendant was voluntary on the part of the plaintiff and that as a result of such voluntary action the resident defendant is out of the case, leaving a controversy wholly between residents of different states. *Whitcomb vs. Smithson,* 175 U. S. 635; 44 L. Ed. 303; *Kansas City S. B. Ry. Co. vs. Herman,* 187 U. S. 63; 47 L. Ed. 76; *Lathrop etc. Co. vs. Interior Const. Co.,* 215 U. S. 246; 54 L. Ed. 177; *Southern Ry. Co. vs. Lloyd,* 239 U. S. 496; 60 L. Ed. 402; *American Car & Fdry Co. vs. Kettelhake,* 236 U. S. 311; 59 L. Ed. 594; *Key vs. Western Kentucky Coal Co.,* 237 Fed. 258; *Springer vs. American Tobacco Co.,* 208 Fed. 199.

Chelan County was not dismissed as a party defendant either by the respondent or by the court. The county has appeared throughout by counsel and has urged at all times that it is entitled to be heard and that the case should not be removed. The situation did not change between the filing of the first and the second removal petitions. It is true that respondent had introduced its evidence on the question of damages before the second petition was filed. The evidence has not been certified to this court and therefore what was proved is not shown, but the record does show that Chelan County remained as a party defendant and the facts alleged in respondent's petition to condemn appellant's property, which is the test upon the filing of the petition for removal, were just the same at the time the second petition was filed as they were at the time the first was filed and the case removed and remanded.

The denial by a state court of a second petition to remove a cause to a federal court does not deny any federal right within the meaning of the statutes of the United States governing the appellate jurisdiction of the Federal Supreme Court where the state court did no more than bow to the decision and order of the federal court in the first removal proceedings, remanding the cause to the state court. *McLaughlin Bros. vs. Hallowell,* 228 U. S. 278; 57 L. Ed. 835.

Appellant claims Chelan County was joined as a party defendant merely because of a tax lien held by it on the property sought to be condemned. The order of the court denying the second petition for removal states that the appellant discharged this lien by paying the taxes on March 12, 1927 and that she then proceeded to trial on the 23rd of the following June without objection and at the close of respondent's evidence on June 27th filed a second petition for removal. (T. 94.) Even though a case could be made removable during the course of the trial without the voluntary dismissal by the plaintiff of the resident defendant whose joinder theretofore prevented removal, appellant's right to remove would have been lost by her delay in presenting the petition. *Golden vs. N. P. Ry. Co.,* 104 Pac. 549; 220 U. S. 625; 55 L. Ed. 614; *N. P. Ry. Co. vs. Austin,* 135 U. S. 315; 34 L. Ed. 218.

Although the evidence has not been brought to this court, the record shows that the county was also interested in two county roads across appellant's property, one of which had been vacated and the other established to take the place of the one vacated. T. 24-26, 93, 144, 175, 176, 102, 103.) At any rate the allegations of the plaintiff, in the absence of a claim of fraudulent joinder, determine the removability of the case. Chelan County, Washington, a municipal

corporation, is named in the petition as one of the defendants on account of its being an owner, encumbrancer and person or party interested in the property sought to be condemned (T. 8), and the Supreme Court of Washington has found, and on this question its conclusion is final, that the county was a necessary and indispensable party defendant.

The second petition for removal was filed without notice to respondent or to the other defendant, Chelan County. (T. 95, 205.) The Judicial Code (Sec. 29, Ch. 231, Act of March 3, 1911, 36 Statutes at Large 1095) provides: "Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same." It has been held that this statute is mandatory and failure to give written notice prevents removal or, after removal, requires the cause to be remanded. *Goins vs. S. P. Ry. Co.,* 198 Fed. 432; *In re Vadner,* 259 Fed. 614; *Western Union Teleg. Co. vs. Oakley,* 227 S. W. 211; *Wanner vs. Bissinger,* 210 Fed. 96; *Arthur vs. Md. Casualty Co.,* 216 Fed. 386; *U. S. vs. Sessions,* 205 Fed. 502; *Loland vs. N. W. Stevedoring Co.,* 209 Fed. 626.

Appellant relies entirely for reversal on the alleged denial of the right to remove the case to the federal court on the contention that the Supreme Court of Washington interpreted the Laws of Washington

1893, Ch. 124, Sec. 79, p. 358, Sec. 88, p. 361; Laws of 1895, Ch. 176, Sec. 19, p. 516, Sec. 21, p. 520; Laws of 1897, Ch. 7, Sec. 78, p. 174, Sec. 83, p. 176; Laws of 1903, Ch. 59, Sec. 3, p. 74 (Sec. 11234, 11235, 11239, 11240, 11241, 11252, 11267 and 11272 Remington's Compiled Statutes of Washington), to mean the taxes levied in September 1926 were a lien on appellant's property from March 1, 1926, although they could not be paid until the first Monday in February, 1927, and that this interpretation of the tax statutes of the State of Washington prevented removal to the federal court, which amounted to the denial of a federal right granted by Article 3, Sec. 2, paragraph 1 of the Constitution of the United States (Assignment of Error VI, T. 152). The record does not show that this question was either submitted to or decided by the Supreme Court of the State of Washington. (T. 142, 148, 202, 206.) For that reason we will give it only brief consideration.

The statutory provisions attacked by the appellant were repealed long prior to the institution of this proceeding and were not before the State Supreme Court for consideration. In 1925 the Washington Legislature enacted a comprehensive tax code (Ch. 130, Laws of Washington, Extraordinary Session 1925), and repealed the previous statutes, including

the particular sections referred to by appellant. (See Appendix, p. 104.)

The question raised by appellant as to the effect of these two provisions is therefore not before the court. Section 104 of Chapter 130, Laws of Washington, Extraordinary Session 1925, provides:

> "The taxes assessed upon real property shall be a lien thereon from and including the 1st day of March in the year in which they are levied until the same are paid, but as between the grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year."

Statutes of this kind are not uncommon. *Barnum vs. Rallihan,* 112 N. E. 559, 565 (Ind.); *Logan vs. Luukinen,* 231 Pac. 184, 186 (Ore.); *Security System Co. vs. Pierce Co.,* 154 N. E. 190 (Mass.); *Shaffner vs. Lipinsky,* 138 S. E. 418 (N. C.); *McLaren vs. Shebele,* 45 Mo. 130.

So long as they proceed within reasonable limits and general usage, tax regulations are within the discretion of the people of the various states in framing their constitutions and of the legislatures of the states of the Union. *P. S. P. & L. Co. vs. King County,* 264 U. S. 22, 27; 68 L. Ed. 541, 546; *Provident Institution vs. Mayor etc. of Jersey City,* 113 U. S. 506; 28 L. Ed. 1102; *Bells Community R. R. Co. vs. Penn.,* 134 U. S. 232, 237; 33 L. Ed. 892, 895.

The right of removal from a state court to a federal court is purely statutory. It is not granted by the Constitution of the United States. If the joinder of necessary and indispensable parties under the state law prevents removal there is no denial of a federal right. *Phoenix Ins. Co. vs. Pechner,* 95 U. S. 183; 24 L. Ed. 427; *Little York Gold Mining Co. vs. Keyes,* 96 U. S. 199; 24 L Ed. 656; *G. N. Ry. Co. vs. Alexander,* 246 U. S. 276; 62 L. Ed. 713; 23 *R. C. L. Title, Removal of Causes,* p. 610; *Lewiston & N. R. Co. vs. Schmidt,* 177 U. S. 230, 237; 44 L. Ed. 747, 750; *Bellaire vs. B. & O. R. R. Co.,* 146 U. S. 117; 36 L. Ed. 910; *Kohl vs. U. S.,* 91 U. S. 367, 378; 23 L. Ed. 449, 453.

IX. No Federal Question Is Raised by This Appeal.

The questions discussed in the briefs are the service of notice on the appellant by publication, whether all of the Chelan power will be devoted to public use, whether any of this power will be used in the State of Idaho, whether the distribution of the Chelan power by another public service company affects the question of public use, whether the land sought to be condemned was described with reasonable certainty, whether the provision in the decree measuring the elevation of the lake at still water was authorized under the pleadings, errors in instructions given and refused

and whether there was a denial of the right of removal. Under the record in this case none of these issues raise any federal question.

Neither the evidence introduced in the trial court nor the assignments of error on the appeal from the lower court to the Supreme Court of the State of Washington have been certified to this court. Therefore it is impossible to determine whether any federal questions were raised before the Supreme Court of Washington which are not referred to in the opinions of that court. Consequently the only federal questions which this court can consider are those passed upon and discussed in the two opinions of the Supreme Court of Washington rendered in this case. (T. 145, 202.)

The Supreme Court of Washington says in its first opinion on the question of the service of notice by publication:

> "Another assignment of error on behalf of Miss Wick is that due process of law is not afforded non-resident land owners by Section 2, Laws of 1890, p. 295; Rem. Comp. Stat.; Sec. 922 * * *
>
> "In our opinion the statute in question is a valid one, and the notice in this case did provide and give reasonable time and opportunity to be heard."
>
> (T. 145, 148.)

The opinion of the Supreme Court of Washington does not show that any contention was made in that court that the eminent domain statutes of Washington denied appellant due process of law guaranteed to her by the federal constitution. The state court did not hold that the Washington statute with reference to notice in an eminent domain proceeding affords due process of law under the Constitution of the United States, and there is nothing in the record to show that this question was presented to the Supreme Court of Washington. What the Supreme Court of Washington held is that the state statute does not fix the length of time that must elapse between publication and the return day, and that in this instance the 18 days' notice which was given was sufficient to constitute reasonable notice within the due process of law requirement of the state constitution. (Appendix, p 99 and p 100.) In a case of this kind, where the federal constitution is not specifically referred to in the opinion of the court, it will be presumed that the reference is to the state constitution. *Hulbert vs. Chicago,* 202 U. S. 275, 280; 50 L. Ed. 1026, 1028, *Osborne vs. Clarke,* 204 U. S. 565; 51 Law Ed. 619, *Consolidated Turnpike Co. vs. N. & O. V. R. Co.,* 228 U. S. 326; 57 L. Ed. 857.

The decision of the highest court of the state as to the validity of a state statute under the state constitution is conclusive on this court. *P. S. P. & L. Co. vs. King County,* 264 U. S. 22; 68 L. Ed. 541.

Where due process of law, including just compensation for property taken for public purposes, is guaranteed by the state laws and constitution, and the case might well have been litigated wholly upon local law, the asserted right to just compensation for property taken in eminent domain proceedings does not necessarily present a question under the Fourteenth Amendment to the United States Constitution so as to sustain an appeal to the Supreme Court of the United States to review a judgment of the highest court of a state denying such right. *Consolidated Turnpike Co. vs. N. & O. V. R. Co.,* 228 U. S. 326; 57 L. Ed. 857. (For provisions of constitution of the State of Washington in regard to due process of law and taking of property for public use, see Appendix, p. 97.)

The question as to the validity of a state law under the constitution of the United States is not necessarily involved so as to sustain an appeal to the Supreme Court of the United States from a state court merely because the state law logically might have been assailed as invalid under the federal constitution upon grounds more or less similar to those actually taken. *Osborne vs. Clarke,* 204 U. S. 565; 51 L. Ed. 619.

On the question of public use the Supreme Court of Washington says in its first opinion:

> "It is claimed that the use contemplated in this case is not a public one, because the Chelan Electric Company has no transmission line nor any customer except the Washington Water Power Company which owns practically all of the stock of the Chelan Electric Company. That situation was explained in the Getty case. The Washington Water Power Company is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned, there is no question about the public use to which the property will be put.
>
> "Further, it is said that the use is a private one and that there is no right or power of eminent domain, because the electric energy produced at the Lake Chelan plant will be used in Idaho. The same contention was made in the Getty case, wherein we did not find it necessary to decide whether that, if true, would defeat the right of eminent domain, because of a finding in that case to the effect that such electric energy would not be used in the state of Idaho, and said in that case that the record, as we understood it, did not lead to a different view from that of the trial court. Admitting the record and conclusion in that case, relators now say that the proof is different in the present case, that they have now furnished additional evidence in support of their claim. But so has the condemner introduced evidence additional to that it relied on in the other case, and upon all of it, conflicting as it is, the trial court has again found that none of the energy so produced will flow into Idaho. And again

we must say, as in the Getty case, 'an examination of the record does not lead to a different conclusion.' The question involved is one of fact and in reaching our conclusion, as we examine and study the testimony, we bear in mind, of course, the opinion of the trial judge, who had the advantage of observing the appearance of the witnesses and their manner of testifying. This, according to our general rule."

On the question of the sufficiency of the description, the Supreme Court of Washington says in its first opinion:

"It is assigned that the property in each case is not described with reasonable certainty and that, therefore, the trial court obtained no jurisdiction. The descriptions are long and need not be set out in this opinion. An examination of them, however, satisfies us that they are sufficient to satisfy all question of jurisdiction, as the same affects the rights of resident owners upon whom personal service was had, or the rights of any non-resident owner upon whom service was had by publication of notice. In substance, the descriptions are like the one held to be sufficient in the Getty case."

Nothing whatever is said by the Supreme Court of Washington about the form of the decree and the measurement of the elevation of the lake at still water. Appellant contends that by measuring the lake at still water the rights obtained by respondent exceed those granted by the Federal Power License. But this point was not passed upon by the Supreme Court of Wash-

ington and there is nothing in the record to show that either of these questions was raised in that court. This court has heretofore refused to take jurisdiction of one of the Lake Chelan cases for the purpose of construing the Federal Power License. *Crooker Perry et al vs. Chelan Electric Co.,* 49 Sup. Ct. R. 478; 73 L. Ed. 545.

Appellant's contentions with respect to the instructions given and refused raise no federal questions. The only questions decided by the State Supreme Court were whether the instructions given commented upon the facts or were argumentative. (T. 204.) Obviously, no federal question is involved. Assignments of error which assail the correctness of various rulings of the state court on purely state questions will be disregarded by this court which is bound by the construction of the state law by the state court. *State of Missouri ex rel. Hurwitz vs. North,* 271 U. S. 40; 70 L. Ed. 818.

Appellant not having caused the evidence to be certified to this court, it will be presumed that there was evidence tending to support the findings of the state court. *Hansen vs. Boyd,* 161 U. S. 397; 40 L. Ed. 746; *Clarke vs. Pennsylvania,* 128 U. S. 395; 32 L. Ed. 487; *Capperton vs. Bowyer,* 14 Wall 216; 20 L. Ed. 882.

There is no presumption, in the absence of a reference to the federal questions in the opinion of the state court, that the state court considered such questions, and where there is no proof that it did, this court will decline to review the questions. *Chicago I. & L. R. Co. vs. McGuire,* 196 U. S. 128; 49 L. Ed. 413.

In order that a federal question may be considered by this court on writ of error to a state court, it must appear upon the record that the Supreme Court of the state dealt with the question. *Cox vs. State of Texas,* 202 U. S. 446, 50 L. Ed. 1099; *Bullen vs. Wisconsin,* 240 U. S. 625, 632; 60 L. Ed. 830, 836; *C. B. & Q. R. Co. vs. Railroad Commission,* 237 U. S. 220, 234; 59 L. Ed. 926, 933; *Illinois Central Railroad Co. vs. Mulberry Hill C. Co.,* 238 U. S. 275, 281, 59 L. Ed. 1306, 1309.

The record must affirmatively show that the validity of the state statute under the Constitution of the United States was drawn in question as repugnant to the Constitution, and that the decision of the State Supreme Court sustained its validity, or that a right under the Constitution or laws of the United States was especially set up or claimed, and denied. *L. & N. R. Co. vs. Louisville,* 166 U. S. 709; 41 L. Ed. 1173; *Oxley Stave Co. vs. Butler Co.,* 166 U. S. 648; 41 L. Ed. 1149; *Home for Incurables vs. City of New York,*

187 U. S. 155, 47 L. Ed. 117; *Seaboard Air Line R. Co. vs. Duvall,* 225 U. S. 477, 56 L. Ed. 1171.

An assignment of error raising a federal question must be specific and if the record brought here shows that no such federal question was raised in the State Supreme Court, or that it was raised in very general terms, it will be held that the federal question has been waived. "There is nothing to prevent a party from waiving a federal right of this character if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the cause." *Harding vs. Ill.,* 196 U. S. 78, 49 L. Ed. 394; *Marvin vs. Trout,* 199 U. S. 212, 50 L. Ed. 157; *Clarke vs. McDade,* 165 U. S. 168, 41 L. Ed. 673; *Hamblin vs. Western Land Co.,* 147 U. S. 531, 37 L. Ed. 267; *Hulbert vs. Chicago,* 202 U. S. 275, 50 L. Ed. 1026.

The appellant cannot in this court argue other federal questions, not directly connected with those decided by the State Supreme Court, and not raised in that court. It is not enough that there may be somewhere hidden in the record questions which, if raised, would be of a federal nature. A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. A point that was never raised cannot be said

to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is a denial of a claim or right which might have been involved therein, but which, in fact, was never in any way set up or spoken of. *Dewey vs. Des Moines,* 173 U. S. 193, 43 L. Ed. 665; *Hamilton Mfg. Co. vs. Mass.,* 6 Wall. 632, 18 L. Ed. 904; *Mattheson vs. Alabama Bank,* 7 How. 260, 12 L. Ed. 692.

The defeated party cannot raise a federal question for the first time when he takes his writ of error to the Supreme Court of the United States. It is even too late to raise a federal question for the first time in a petition for rehearing after the final judgment of the state court of last resort. *Consolidated Turnpoke Co. vs. N. & O. V. R. Co.,* 228 U. S. 326, 57 L. Ed. 857; *Burt vs. Smith,* 203 U. S. 129, 51 L. Ed. 121; *Harding vs. Illinois,* 196 U. S. 78, 49 L. Ed. 394; *Sayward vs. Denny,* 158 U. S. 180, 183; 39 L. Ed. 941, 942.

The right of removal to the federal court was not denied to appellant. As heretofore pointed out, this case was removed to the federal court and remanded to the state court. (T. 34.). At the trial on the question of damages and upon the conclusion of respondent's evidence appellant presented a second petition

for removal to the federal court. (T. 86, 92.) The first and second petitions for removal are substantially identical. (T. 20, 86.) At the time of the presentation of both petitions for removal, Chelan County, Washington, a municipal corporation, and a citizen of the State of Washington, was and still is a joint defendant in the action with appellant, a citizen and resident of the state of Pennsylvania. Chelan County joined in the motion to remand the case to the state court (Tr. 25, 27), and filed written objections to the second petition for removal. (T. 175, 176.) The trial court found that between the presentation of the first petition and the second petition for removal there had been no change in the status of the parties to the action. (T. 95.)

An order of a Federal District Court remanding a cause to a state court is not subject to review by the Federal Supreme Court, either directly or indirectly, or by writ of error to the Supreme Court of a state. The action of the Federal District Court in remanding a cause is final and conclusive. *Matter of Matthew Addy Steamship Co. vs. Commerce Corporation, supra, Pacific Line S. S. Co. vs. Lewis, supra, Missouri Pacific Ry. Co. vs. Fitzgerald, supra, McLaughlin Bros. vs. Hallowell, supra.*

The denial by the state court of a second petition to remove a cause to a federal court does not deny any federal right within the meaning of the statutes of the United States governing the appellate jurisdiction of the United States Supreme Court where the state court did no more than bow to the decision and order of the federal court in the first removal proceedings, remanding the cause to the state court. *McLaughlin Bros. vs. Hallowell,* 228 U. S. 278; 57 L. Ed. 835.

A state court cannot be held to have decided against a right of removal when it has simply accepted the conclusion of the federal court remanding the cause. *Missouri Pacific Ry. Co. vs. Fitzgerald,* 160 U. S. 556,, 581; 40 L. Ed. 536, 542.

It is respectfully submitted that no substantial federal questions are involved in this case.

To give this court jurisdiction on appeal from a state court, there must be a real and substantial controversy which deserves serious attention. *U. S. Fidelity & Guaranty Co. vs. State of Oklahoma,* 250 U. S. 111, 63 L. Ed. 876; *Boston vs. Jackson,* 260 U. S. 309; 67 L. Ed. 274; *Norton vs. Whiteside,* 239 U. S. 144, 153; 60 L. Ed. 186, 190.

It is the duty of the court to decline jurisdiction whenever it appears that the constitutional question presented is not substantial in character. *Zucht vs. King,* 260 U. S. 174; 67 L. Ed. 194.

Questions of the kind here presented have been held to be too frivolous and unsubstantial in character to warrant this court taking jurisdiction. *House vs. Road Improvement Dist. No. 5, supra, Missouri Pacific R. Co. vs. Clarendon Boat Co.,* 257 U. S. 533; 66 L. Ed. 354; *Deming vs. Carlisle Packing Co.,* 226 U. S. 102; 57 L. Ed. 140.

We respectfully submit that the appeal should be dismissed and the judgment of the Supreme Court of the State of Washington affirmed.

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APPENDIX

CONSTITUTION OF THE STATE OF WASHINGTON

ARTICLE I.

Bill of Rights

Sec. 3. PERSONAL RIGHTS—No person shall be deprived of life, liberty, or property without due process of law.

ARTICLE XXI.

Water and Water Rights

Sec. 1. PUBLIC USE OF WATER—Use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.

AMENDMENT IX.

Art. I., Sec. 16. EMINENT DOMAIN—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, . . . irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained

by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. . . .

REMINGTON'S COMPILED STATUTES OF WASHINGTON, 1922

Sec. 921. EMINENT DOMAIN BY CORPORATIONS: PETITION, REQUISITES OF—Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the Superior Court of the county in which any land, real estate, or premises, or other property sought to be appropriated shall be situated . . . a petition in which the land, real estate, premises or other property sought to be appropriated *shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records,* the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascer-

tain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property . . . (L. '88, p. 58, Sec. 1; L. '90, p. 294; 2 H. C., sec. 648.)

Sec. 922. NOTICE, CONTENTS AND SERVICE.

A notice, stating briefly the objects of the petition, *and containing a description of* the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same shall be presented to the court, or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode by leaving a copy of such notice at his or her usual place of abode. . . . *In all cases where the owner or person claiming an interest in such real or other property is a non-resident of this*

state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a non-resident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, *service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; . . . And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown.* . . . Due proof of service of such notice, by affidavit of the person serving the same or by the printer's affidavit of publication, shall be filed with the clerk of said Superior Court before or at the time of the presentation of such petition. Want of the service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. (L. '88, p. 28, Sec. 2; L. '90, p. 299, Sec. 2; 2 H C., Sec. 649.)

Sec. 925 COURT TO ADJUDICATE NECESSITY FOR APPROPRIATION; CALLING JURY.

At the time and place appointed for hearing said petition or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises, or other property sought to be appropriated are required and necessary for the purpose of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury. (Cf. L. '88, p. 60, Sec. 4; L. '90, p. 297, Sec. 4; 2 H. C., Sec. 651; L. '97, p. 63, Sec. 1.)

Sec. 926. TRIAL—HOW CONDUCTED.

A judge of the Superior Court shall preside at the trial . . . and the jurors at such trial shall make in each case a separate assessment of damages which shall

result to any person, corporation, or company, or to the state, *or to any county,* by reason of the appropriation and use of such land, real estate, premises, or other property by such corporation, as aforesaid, for any and all corporate purposes, and shall ascertain, determine, and award the amount of damages to be paid *to said owner or owners respectively, and to all tenants, encumbrancers and others interested,* for the taking or injuriously affecting the land, real estate, premises, or other property, for the purpose of such enterprise, irrespective of any benefit from any improvement proposed by such corporation. . . . Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded *to such owner or owners respectively, and to all tenants, encumbrancers, and others interested,* for the taking or injuriously affecting such land, real estate, premises or other property. (L. '90, p. 297, Sec. 5; 2 H. C., Sec. 652.)

Sec. 927. JUDGMENT AND DECREE OF APPROPRIATION.

At the time of rendering judgment for damages, whether upon default or trial if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of

way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this chapter provided. (Cf. L. '90, p. 298, Sec. 6; L. '91, p. 84, Sec. 1; 2 H. C., Sec. 653.)

TAX LAWS

Laws Extraordinary Session 1925 (Passed at the Extraordinary Session of the Legislature of the State of Washington, convened November 9, 1925)

CHAPTER 130

RELATING TO ASSESSMENT, LEVY AND COLLECTION OF TAXES

Sec. 138. The acts and parts of acts relating to taxation and the assessment, levy and collection of taxes, enumerated in the following schedule, are hereby repealed.

SCHEDULE

"Chapter CXXIV (124) Laws of 1893, pp. 323-385; . . . Chapter CLXXVI (176) Laws of 1895, p. 508-525; . . . Chapter LXXI (71), Laws of 1897, pp. 136-193; . . . Chapter 59, Laws of 1903, pp. 73-78.

"The following sections of Remington's Compiled Statutes of Washington: 11097 to 11171, both inclusive; 11188 to 11200, both inclusive; 11219 to 11225, both inclusive; 11234 to 11241, both inclusive; 11252 to 11311, both inclusive; and 11315 to 11317, both inclusive."

FEDERAL JUDICIAL CODE

Sec. 29. PROCEDURE FOR REMOVAL.

Whenever any party entitled to remove any suit mentioned in the last preceding section, . . . may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court . . . and shall make and file therewith a bond . . . *Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same.* . . .